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536566—60

Court of Appeals

State of New York

1

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

WILLARD H. PHILLIPS,
Defendant-Appellant.

2

Statement

This is an appeal by defendant, Willard H. Phillips, from a judgment of the County Court of Nassau County wherein he was convicted of Murder in the First Degree and sentenced to death.

Phillips was indicted by a Nassau County Grand Jury on June 3, 1958, for Murder in the First Degree, two counts. The First Count charged a felony murder alleging that Willard H. Phillips killed Sunday Graham while engaged in the commission of the crime and felony of Rape in the First Degree. The Second Count charged Phillips with the death of Sunday Graham in common law form. The jury's verdict was rendered under the First Count charging felony murder and withheld a recommendation of mercy. Sentence was pronounced on October 17, 1958.

3

A notice of appeal dated October 17, 1958, was served and filed on October 20, 1958.

On the trial the People were represented by Frank A. Gulotta, District Attorney of Nassau County (William Cahn, Assistant District Attor-

ney), and the defendant was represented by Meyer F. Goodman and John H. Benoit, Esqs. who were assigned by the Court for purposes of trial.

On the appeal the People are represented by Frank A. Gulotta, District Attorney of Nassau County (Henry P. DeVine, Assistant District Attorney), and the defendant is represented by Henry W. Schober and Frank A. Fritz who was assigned by this Court.

5

Notice of Appeal to Court of Appeals

COUNTY COURT

COUNTY OF NASSAU

Nassau County Indictment No. 15,003

—o—

THE PEOPLE OF THE STATE OF NEW YORK,

against

6

WILLARD H. PHILLIPS,

Defendant.

—o—

Sirs:

PLEASE TAKE NOTICE that the above named defendant, Willard H. Phillips, hereby appeals to the Court of Appeals of the State of New York from the judgment rendered against him in this Court on the 17th day of October, 1958 upon a verdict convicting him of the crime of Murder in the First Degree and sentencing him to death, and

from the order denying defendant's motion to set aside the verdict of the jury and for a new trial, and from each and every part of the said judgment and order.

Dated: Freeport, N. Y.
October 17, 1958.

Yours, etc.,

MEYER F. GOODMAN and
JOHN H. BENOIT
Attorneys for the Defendant
Office & P. O. Address
65 W. Sunrise Highway
Freeport, N. Y.

To:

FRANK A. GULOTTA
District Attorney of Nassau County
Mineola, N. Y.

ERNEST F. FRANCKE
Clerk of the County Court of Nassau County

10

Indictment

COUNTY COURT

OF THE COUNTY OF NASSAU

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLARD H. PHILLIPS,

Defendant.

11 THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment, accuse the defendant of the crime of MURDER in the FIRST DEGREE, committed as follows:

The defendant, WILLARD H. PHILLIPS, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, wilfully and feloniously, while engaged in the commission of a felony, to wit, the crime and felony of Rape in the First Degree, killed one Sunday Graham by causing her to suffocate and by choking her with
12 a belt.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this indictment, accuse the defendant of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

The defendant, WILLARD H. PHILLIPS, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, wilfully and feloniously and of malice aforethought, killed one Sunday Graham by causing her to suffocate and by choking her with a belt.

Dated: June 3, 1958

FRANK A. GULOTTA
District Attorney

13

Endorsements on Indictment

No. 15003

COUNTY COURT

NASSAU COUNTY

———— ——o————

THE PEOPLE,

VS. 14

WILLARD H. PHILLIPS,

Defendant.

————o————

FRANK A. GULOTTA
District Attorney

INDICTMENT FOR
MURDER FIRST DEG. (2 cts.)

A TRUE BILL 15

CLAUDE G. WILLIAMS
Foreman

16

Extract from Clerk's Minutes as to Arraignment

COUNTY COURT

TRIAL TERM

Present:

HON. PAUL J. WIDLITZ,
County Judge of Nassau County.

June 4, 1958

Indictment No. 15003

111

17 MOXEY RIGBY Ass't District Attorney

no Counsel for Deft.

———o———

THE PEOPLE OF THE STATE OF N. Y.

vs.

WILLARD H. PHILLIPS.

———o———

18 The said Willard H. Phillips having on June 3, 1958, been indicted for Murder First Degree (2 counts) was arraigned before the Court.

Before pleading to the indictment the defendant was informed of his right to counsel and was asked if he desired the aid of counsel.

The defendant did ask for the aid of counsel.

The Court directed a plea of not guilty of Murder First Degree (2 counts). Remanded to Nassau County Jail pending assignment of counsel and trial.

Meyer F. Goodman Esq. and John Benoit Esq. assigned as counsel and co-counsel.

19

Extract from Clerk's Minutes as to Verdict of Jury

At a Trial Term of the County Court, held in and for Nassau County, at the Court House, at Mineola, Nassau County, on the 29th and 30th September and the 1st, 2nd, 6th, 7th and 8th days of October, 1958.

Present:

HON. PAUL J. WIDLITZ,
County Judge of Nassau County.

20

Indictment No. 15003

WILLIAM CAHN, As't. District Attorney.

MEYER F. GOODMAN and JOHN H. BENOIT, for Def't.

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

21

WILLARD H. PHILLIPS.

———o———

Murder First Degree (2 counts)

This cause having been called in its regular order on the Calendar, on motion of William Cahn, As't. District Attorney for the People ordered that a jury be called and this cause tried. Defendant informed of Section 369 of C. C. P.

22 *Extract from Clerk's Minutes as to Verdict of Jury*

Jury duly drawn, called and sworn, or affirmed, and cause tried.

The Jury retired in charge of a sworn officer, and subsequently they came into Court, and being called, say that they did find the defendant Willard H. Phillips Guilty of Murder First Degree, 1st count of Indictment, without a recommendation for leniency.

23 Jury polled at the request of Mr. Benoit, counsel for defendant, all answering in the affirmative.

Mr. Benoit, counsel for defendant, moved to set aside verdict as contrary to law and against the weight of evidence. Motion Denied.

Pedigree taken.

Defendant remanded for sentence on October 17th, 1958.

24

25

Pedigree

Indictment No. 15003

Date—Oct 8 1958

My true name is Willard H. Phillips

Counsel—Meyer F. Goodman & John H. Benoit
Trial—V

Convicted of Murder 1st Degree, 1st count of Indictment, without a recommendation for leniency

26

Sex—Male

Age—42

Place of birth—Dublin Ga.

Citizen of U. S.—Yes

Previous felony convictions—Yes

What crime—Attempted rape

Time served—10 years

Where—Sing Sing

Occupation—Laborer

27

Do you have a mechanical trade? Electronic repairs

Religion—Catholic

Education—High School

Parents living—Father

Do you drink to excess? no

Single

Last place of residence—38 Garfield Pl. Hempstead

28

Extract from Clerk's Minutes as to Sentence

COUNTY COURT

TRIAL TERM—PART I

HON. PAUL J. WIDLITZ,
County Judge Nassau County.

October 17, 1958

Proclamation made, Court opened

Indictment No. 15003

29

MOXEY RIGBY, A. District Attorney.

MEYER F. GOODMAN, JOHN BENOIT, Counsel.

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLARD H. PHILLIPS.

———o———

The said Willard H. Phillips, having on October 8, 1958, been found Guilty of Murder 1st Degree, 1st count of indictment with no recommendation for leniency by a verdict of a jury, was arraigned before the Court.

30

The following question was asked the defendant: Have you any legal cause to show why judgment should not be pronounced against you? The defendant answered "No".

Whereupon it is ordered and adjudged by the Court that for the crime of Murder 1st degree of which he stands convicted, the said Willard H. Phillips be committed to Sing Sing State Prison, there to be put to death in the manner provided by law during the week of November 24th, 1958.

31

Death Warrant

Indictment #15003

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLARD H. PHILLIPS.

———o———

32

STATE OF NEW YORK }
COUNTY OF NASSAU } SS.:

To the agent and Warden of the Sing Sing State Prison at Ossining, New York.

WHEREAS, at a Trial Term of the County Court, held in and for the County of Nassau, at the Court House in Mineola, Nassau County, New York on the 29th day of September 1958 and the days following, one Williard H. Phillips was put upon his trial for the murder of Sunday Graham 33
on or about the 12th day of May 1958 in the County of Nassau, and upon said trial was found guilty, by a verdict of a jury, on October 8, 1958 of Murder in the First Degree, first count of the indictment, for said killing, and on October 17, 1958 was sentenced to be put to death in the manner provided by law, on some day in the week beginning November 24th, 1958.

34 *Death Warrant*

Now

IT IS HEREBY ORDERED, that execution of the said Sentence be done upon said Willard H. Phillips by you, the said Agent and Warden of Sing Sing State Prison, in the manner provided by law, on such day in the week beginning on the 24th of November 1958 as you shall determine, within the walls of your said prison or the yard or enclosure thereto adjoining.

35 WITNESS my hand at Mineola, County of Nassau, State of New York, aforesaid, this 17th day of October 1958.

PAUL J. WIDLITZ,
County Judge, Nassau County.

Given under my hand and attested
by the seal of the said Court this
17th day of October 1958.

ERNEST F. FRANCKE, Clerk.

36

37

Trial Minutes

COUNTY COURT

NASSAU COUNTY

PART I

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLARD H. PHILLIPS, 38

Defendant.

———o———

Mineola, N. Y.,
September 29, 1958.

Before:

HON. PAUL J. WIDLITZ,
County Judge,
and a Jury.

Appearances:

WILLIAM CAHN, Esq. and JOHN S. LOCKMAN, 39
Esq., for the People.

MEYER F. GOODMAN, Esq. and JOHN H. BENOIT,
Esq., for the Defendant.

(Case called.)

(Both sides answer ready.)

The Clerk: If the defendant intends to challenge an individual juror he must do so when his name is called and before he is sworn.

40 *Examination of Prospective Jurors*

(Counsel proceeded with the examination of prospective jurors.)

(During the examination of prospective juror Olga Edna Simonson the following occurred):

Mr. Goodman: If your Honor please, for the sake of expedition the defendant now wishes to state for the record that he is not going to interpose a defense of legal insanity, and for that reason—I make that statement from the point of view of the District Attorney in interrogating the
41 members of the panel. That defense is not going to be raised.

The Court: We will have a recess now for ten minutes. I would like to suggest to all you potential members of the jury that you refrain from reading any newspaper accounts of these proceedings while these proceedings are proceeding, or listen to any radio broadcasts, if such there be.

If during the recess I have some further applications with respect to excuses of jurors, just remain and I will speak to you.

42 (A short recess was thereupon taken.)

(After recess.)

(Counsel continued with the examination of prospective jurors.)

(Juror No. 1 was duly accepted and sworn.)

The Court: All right, I am going to admonish the lone juror as we recess now until 2 o'clock.

You are not to discuss this case with anyone, you are not to formulate or express an opinion with respect to the guilt or innocence of the de-

fendant, and you will continue following my instructions right along through the course of this trial and until after I charge the jury and you have retired to the jury room to deliberate.

This is going to be somewhat of a protracted trial because of the seriousness of the alleged crime. You will refrain from reading any newspaper accounts of this trial or of these proceedings and you will refrain from listening to any radio broadcasts, if such there be, during the entire course of this trial.

All right, take the juror out to lunch and everybody else will return at 2 o'clock. Recess until 2 o'clock. 44

(A recess was thereupon taken for luncheon.)

AFTERNOON SESSION

(Counsel continued with the examination of prospective jurors.)

(Jurors numbers 2 and 3 were duly accepted and sworn.)

45

The Court: There will be a ten-minute recess, gentlemen of the jury. Do not discuss this case among yourselves or formulate or expre) an opinion with respect to this case until you finally deliberate in your jury room at the end of this whole matter.

Ten minutes recess.

(A short recess was thereupon taken.)

(After recess.)

(Counsel continued with the examination of prospective jurors.)

46 *Examination of Prospective Jurors*

(Juror numbers 4, 5, 6 were duly accepted and sworn.)

The Court: All right,, we will recess now. We will recess until tomorrow morning at 10 o'clock.

Gentlemen of the jury, you are not to discuss this case among yourselves or formulate or express an opinion with respect to this trial until you finally deliberate in the jury room at the end of this case. You will refrain from reading any newspaper reports or listening to any radio broad-
47 casts, if such there be, during the course of this trial or until the end of this trial.

(The trial was thereupon adjourned until September 30, 1958.)

Mineola, N. Y.,
September 30, 1958.

Before:

HON. PAUL J. WIDLITZ,
County Judge,
and a Jury.

48

(Appearances as before noted.)

(Trial continued.)

(Roll call of jurors.)

(Counsel proceeded with the examination of prospective jurors.)

(Jurors numbers 7 and 8 were duly accepted and sworn.)

The Court: There will be a ten-minute recess. Gentlemen of the jury, you are not to formulate

or express an opinion with respect to these proceedings or this trial until you finally deliberate in the jury room at the end of this case.

There will be a ten-minute recess.

(A short recess was thereupon taken.)

(After recess.)

(Counsel continued with the examination of prospective jurors.)

(Jurors numbers 9 and 10 were duly accepted and sworn.)

The Court: We will recess now until 2 o'clock.

Gentlemen of the jury, do not discuss this case amongst yourselves until you deliberate in the jury room at the end of the case.

2 o'clock luncheon recess.

(A recess was thereupon taken for luncheon.)

AFTERNOON SESSION

(Roll call of jurors.)

(The following occurred at the bench without the hearing of the jury):

Mr. Cahn: Your Honor, I have learned since the noon recess that Mr. Gatteau, juror No. 7, I believe he is, does know the District Attorney, Frank Gulotta. I believe when I questioned him he mentioned that he met Mr. Gulotta at a couple of Rotary meetings and that his acquaintance with Mr. Gulotta would not make any difference,

52 *Examination of Prospective Jurors*

but I wanted to inform Mr. Goodman that I am under the impression that the acquaintanceship is a little more than that and I will go along with whatever Mr. Goodman wants to do.

Mr. Goodman: I am persuaded from my observation of the gentleman that he certainly did not intend to deliberately deceive or conceal any facts. I am persuaded that he is still a reliable juror and I feel that to take him out and to in any way let the remainder of the panel feel that anything is wrong would be most harmful, and I will
53 go along with remaining as we are.

(Counsel continued with the examination of prospective jurors.)

(Juror No. 11 was duly accepted and sworn.)

The Court: There will be a ten-minute recess. Gentlemen of the jury, do not discuss this case among yourselves until you finally deliberate in your jury room at the end of the case.

Ten-minute recess.

54 (A short recess was thereupon taken.)

(After recess.)

(Counsel continued with the examination of prospective jurors.)

(Juror No. 12 was duly accepted and sworn.)

The Court: I direct the selection of two alternate jurors. Three peremptories on each.

(Counsel proceeded with the examination of alternate jurors.)

55

(Alternate jurors numbers 1 and 2 were duly accepted and sworn.)

(The entire jury of 14 was sworn as a body.)

The Court: All right, gentlemen, I wish to advise you not to formulate or express an opinion with respect to this case. Refrain from reading any newspaper accounts of this trial or listening to any radio broadcasts, and refrain from discussion generally about the proceedings in this case until you finally deliberate in the jury room at the end.

56

As the plans now go, tomorrow morning we will open up and proceed with the trial. Thursday evening we will adjourn to Monday morning. There will be no trial of this case Friday, so you will not have to come in Friday. We are having induction ceremonies here for a new Judge that is coming on to our bench, and since I have to preside I will not be able to sit in this trial. And we also have sentences for the balance of the day, so it would be a waste of time to bring you back.

So we will adjourn Thursday evening until Monday and then we will go right up until the end. We will adjourn now until 10 o'clock tomorrow morning.

57

(The trial was thereupon adjourned until October 1, 1958.)

58 *Colloquy*

Mineola, N. Y., October 1, 1958.

Before:

HON. PAUL J. WIDLITZ, *County Judge,*
and a Jury.

(Appearances as before noted.)

(Trial continued.)

(Roll call of jurors.)

Mr. Goodman: If your Honor please, in advance
59 of opening the defendant has an application. I do not feel that the application is premature because one of my purposes in making it is tied in with the opening which I contemplate making on behalf of the defendant.

At this time, if your Honor please, the defendant respectfully moves that all witnesses for the prosecution be excluded from the courtroom throughout the entire course of this trial except for such time as they are actually upon the witness stand.

Now, the defense cites in support of this appli-
60 cation some authorities. I refer first to Richardson on Evidence, section 472, which reads as follows:

"The purpose of the exclusion of witnesses is to guard against the possibility of one witness conforming his testimony to that of another witness who has already testified. Exclusion of witnesses from the courtroom is granted in civil cases as well as in criminal cases, for there is as much need for combatting perjury in one class of cases as in the other. There is difference of judicial opinion as to whether this may be demanded as matter of right. In New York, and in most jurisdictions, a

motion for the exclusion of witnesses is addressed to the discretion of the trial court. If the request is made in good faith, however, there is ordinarily no reason why it should be denied."

And I go further, to the Court of Appeals, the case of People against Cooke— 61

The Court: Before you go into all that, let us discuss it. How do you feel about it, Mr. Cahn?

Mr. Cahn: I have no objection to excluding all of the witnesses except the detectives who are aiding me in the trial of this case, and as with all cases, the District Attorney is permitted to have 62 any detective who assisted in the preparation of the trial of the case present.

I will be glad to exclude any and all other witnesses that I intend to call. There is no problem and no question. Detective Rofheart will leave. Lieutenant Cummings at the present time in my case will not be a witness.

The Court: All right, then you want one detective here, is that it?

Mr. Cahn: Detective Stark is the detective who had charge of the case.

(There was a conference at the bench.) 63

The Court: I direct all witnesses in the case of People against Phillips to leave the court and remain available to the call of this court, with the exception of the one detective who is in charge of the case.

At any stage of the proceeding subsequently application made by defense counsel may be made and I will reconsider his application with respect to Detective Stark.

Mr. Goodman: Thank you, your Honor.

The Clerk: All witnesses will wait outside until called.

64 *Opening Statement on Behalf of People*

(Mr. Cahn opened to the jury on behalf of the People as follows):

Mr. Cahn: If the Court please, Mr. Goodman, Mr. Benoit, Mr. McCann and gentlemen: The law requires at this time that the District Attorney open his case and tell the jury what he expects the evidence to prove. Therefore, gentlemen, you will perceive that what I say here to you now is not evidence, nor is it to be considered by you as such. For, as we have heard throughout the past two
65 days, the evidence comes from one source, and that is the witness who testifies from the witness box under oath. That is the only source of evidence, the only evidence which you are to consider.

But this is just an outline which the law requires the District Attorney to make, an outline of what we expect the evidence to show. In doing this, gentlemen, I think it is fitting and proper to read the indictment, the Grand Jury indictment, at this time, also taking into consideration that this indictment by the Grand Jury of this
66 county is absolutely no evidence of guilt on the part of the defendant. It is a mere legal process by which the defendant is brought into court to answer a charge. It has absolutely no probative value whatsoever, for the guilt or the innocence of the defendant once again rests solely upon the evidence presented to you by the witnesses and the law as given to you by his Honor.

The indictment reads: "The People of the State of New York against Willard H. Phillips, defendant.

"The Grand Jury of the County of Nassau by this indictment accuse the defendant of the crime

of murder in the first degree, committed as follows:

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, willfully and feloniously, while engaged in the commission of a felony, to wit: the crime and felony of rape in the first degree, killed one Sunday Graham by causing her to suffocate and by choking her with a belt."

That is the first count of the indictment, what is commonly called in legal parlance felony murder, 68
which is murder in the first degree.

The second count reads as follows: "And the Grand Jury aforesaid by this indictment accuse the defendant of the crime of murder in the first degree, committed as follows:

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, willfully and feloniously and of malice aforethought, killed one Sunday Graham by causing her to suffocate and by choking her with a belt.

"Dated June 3, 1958; Frank A. Gulotta, District 69
Attorney."

The second count is also a count of murder in the first degree and in common parlance, legal parlance, legal terms, is called the common law count of murder in the first degree; common law in that it requires premeditation, deliberation, and the intent to kill.

This is what we believe the evidence will show to you: That Monday, May 12, 1958, began as every other school day for Sunday Graham, the adopted

daughter of Mr. and Mrs. Curtis Graham. It began as any other school day. She left about approximately 9 A. M. or a little before for Our Lady of Loretto School, located in Hempstead, New York, County of Nassau.

But Monday, May 12, 1958, was different. Sunday Graham never returned. After hours of waiting and searching Mrs. Myneta Graham, Sunday's mother, reported her missing to the Hempstead Police Department.

71 An immediate search was started around the area and an alarm was sent out over the Nassau County Police Department general alarm system. That evening at about 10 P. M. Sunday was still not found and the third squad of the Nassau County Police Department was notified. They took over the case and joined in the search.

To no avail. Sunday Graham was not found. The following morning detectives proceeded to Our Lady of Loretto School and there questioned the school teachers and schoolmates of Sunday Graham, and as a result of the questioning and as a result of further investigation the defendant,

72 Willard H. Phillips, was asked to report to the third precinct station house at about 12 noon, Williard H. Phillips, the former husband of Myneta Graham, although he had no relationship whatsoever with Sunday Graham. Sunday was the adopted daughter of both Mr. and Mrs. Curtis Graham. And although Mrs. Graham had not seen the defendant Willard Phillips for years—

Mr. Goodman: I didn't hear the last word, Mr. Cahn. I'm sorry.

Mr. Cahn: For years. They began seeing each other in 1957 and, very frankly, an intimate relationship grew between them once again.

Saturday night, May 10th, and Thursday night, May 8th, that relationship was to break off, causing Phillips to become angry and revengeful.

The evidence will show that at about 4 P. M. on May 13, 1958, while Phillips was being questioned as to the missing Sunday Graham at the third precinct station house, Sunday Graham was found. She was found behind a warehouse located on Commercial Avenue in Garden City, County of Nassau, in our State of New York.

We believe the evidence will show also that the defendant, Willard Phillips, with the intent to 74
take the life of Sunday Graham, picked her up at about 3 P. M. after she left school, on Cruikshank Avenue in Hempstead, right near Our Lady of Loretto School, and there drove around to the Babylon Turnpike—Meadowbrook Causeway area in our County of Nassau, and while driving with this aforementioned intent, also decided to violate her body.

And when they arrived at this particular spot he took her into the back seat and above her protestations and in spite of her screams commenced to violate her, rape her. And not only because of 75
her screams, but because of his intent to kill, he took her pants, her underpants, and put those pants practically in their entirety into her mouth and down her throat, causing her to choke, causing her to suffocate, causing her eventually to die. And to make sure she was dead he took her little belt and tied it tightly around her neck.

Thereafter Willard Phillps drove back to Garden City, to Commercial Avenue, and threw her body into a lot behind the warehouses which I have already mentioned, and there she was to remain until 4 o'clock the following afternoon when dis-

covered by an employee of the Long Island Rail Road.

The evidence will also show that Willard Phillips called Mrs. Graham the evening of May 12th and asked her what was all the fuss around her house; what were all the police cars around for? And when told that Sunday was missing he said, "Oh, that's too bad, I'll go out looking for her myself."

And he did. He did knowing full well and at all times that Sunday Graham lay dead behind
77 the warehouses on Commercial Avenue in Garden City.

Gentlemen, it is the People's contention that as the evidence unfolds to you it will prove beyond a reasonable doubt that Willard Phillips, the defendant here before the bar, with premeditation, deliberation and with the intent to kill, out of pure revenge murdered Sunday Graham; and, further, gentlemen, that the evidence will show to you that during the course of ravishing the body of little 8-year-old Sunday Graham he put her pants in her mouth, a belt around her neck,
78 causing her to suffocate, choke and die.

We ask that you listen to the evidence carefully, justly and fairly, and arrive at what you in your own good consciences consider a just and proper verdict, just and proper in so far as this defendant Willard Phillips is concerned, and just and proper in so far as the People of the State of New York are concerned.

I thank you.

Opening Statement on Behalf of Defendant 79

(Mr. Goodman opened to the jury on behalf of the defendant as follows):

Mr. Goodman: May it please the Court, gentlemen of the prosecution, Mr. McCann and gentlemen of the jury: When Judge Widlitz in his judicial wisdom saw fit to assign myself and Mr. Benoit to represent this defendant he in effect addressed us and impliedly said something like this: When the State of New York extended to you the privilege of practicing as a lawyer in this great state you did get many most valuable 70
privileges, but you also assumed very serious and very grave obligations. You are now officers of the courts of this state and it is as much your solemn and sworn duty to see that the law is upheld as it is that of the District Attorney, the state's prosecuting officer. You know the law, you know the rights of every defendant, and it is your obligation and you are sworn to see that those rights and those protective safeguards are constantly kept around every defendant. You must expel from your mind the fact that you are a married man—both of us—and that you, too, 81
each have daughters, and while you each have as much revulsion as any normal human being at this horrible crime, still you must dispel from your mind any consideration as to the brutality of this crime, you must forget all considerations as to how you may feel as to the guilt or innocence of this man, and you must come into this court and do all in your power within the limits of your ability to see that his rights as a citizen are upheld to the letter of the law.

These are the obligations that Mr. Benoit and I had to assume, knowing full well that we must

completely disregard any personal feelings that we may have about this entire case.

And, gentlemen, as I examined each of you I was in effect handing that to you, or at least calling upon you to share with us the same responsibility, to recognize that as you sit in this box and deliberate and finally make a determination and return a verdict, that you, too, must see that the law is upheld to the extent that you must dispel from your minds any feeling of revulsion or shock that you may have at this terrible crime, any
83 moral convictions that you may have as to the guilt or innocence of Phillips, and decide and determine only whether or not the People of the State of New York through the District Attorney of the County of Nassau have upheld the law in that they have proven beyond a reasonable doubt each and every element of the crimes with which this man stands charged. And you have sworn to me that if in any one respect the District Attorney fails to uphold by evidence, regardless of your feelings as normal human beings —if he fails to uphold that burden you will be
84 the guardians of life and liberty and you will return with a verdict of not guilty.

I think by now it should be very clear to you what it is that the defense has in mind in this case. We submit that disregarding any consideration as to the man's guilt or innocence, that the law-enforcement agencies of this county cannot break another law in order to try to establish guilt of a first crime. We maintain that the confession which we know will be the entire basis of the People's case in this case was extracted from this defendant with coercion; that it was not a free and voluntary act on his part, and we say that it was obtained from him through both physical

and mental torture, and we intend to demonstrate that there was a man subjected to 16 hours of constant intensive pressure—torture, if you will —and we believe at least 36 different officers of the Police Department of this county violated his rights, regardless of his guilt or innocence, his right to be brought before a Judge as soon as possible, advised of the crime with which he was charged, and afforded an opportunity to have a lawyer to tell him what his rights were. Denied that right, kept in close custody without food, without sleep for 16 solid hours, denied the right 86
to call on the telephone and denied the opportunity to speak to a friend or a lawyer.

These are the things we intend to demonstarte took place in this particular case, and then we will leave with you gentlemen the very grave and the very serious responsibility to cast aside all thoughts and considerations as far as this terrible crime is concerned, as you have all sworn, and to uphold the greater law to protect and to see that every defendant is afforded the full safeguards provided by the fathers of our constitution.

With that I will now leave you. Thank you. 87

MYNITA GRAHAM, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. Where do you live? A. 10 Seabury Street, Hempstead.

Direct examination by Mr. Cahn:

Q. Mrs. Graham, I am going to ask you to keep your voice up, please, so that Mr. McCann and

88 *Mynita Graham—for People—Direct*

Mr. Gatteau can hear you at all times. Would you do that, please? A. Yes.

Q. You are the mother of Sunday Graham? A. Yes.

Q. Was she known by any other name? A. Dorothy Mynita Graham.

Q. But everybody called her Sunday, is that it? A. Yes.

Q. I show you this, Mrs. Graham, and ask you if you can identify that for us. A. That is Sun-
89 day's birth certificate.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: No objection.

(Birth certificate received in evidence and marked People's Exhibit 1.)

Q. Now, as I understand, Mrs. Graham, you and your husband Curtis adopted Sunday, is that correct? A. Yes.

Q. I show you this and ask you if you can identify this for us. A. Yes.

90 Q. What is that? A. That is the final adoption papers.

Q. Keep your voice up, Mrs. Graham. A. The final adoption papers.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: No objection.

(Adoption papers received in evidence and marked People's Exhibit 2.)

Q. Now, Mrs. Graham, on the morning of May 12, 1958, were you with your daughter, Sunday Graham? A. Yes, I was.

91

Q. Please keep your voice up.

The Court: Mr. Cahn, can I just get for the purpose of the record, when was the girl born? So we have it on the record here.

Mr. Cahn: The certificate speaks for itself.

The Court: Yes, but I want to know.

Mr. Cahn: May 25, 1949.

Q. Tell us about that, if you will, please. A. Pardon me?

Q. Tell us about that, if you will, please. What 92
time were you with her and what happened? A. Well, she usually gets up—

The Court: Speak up, Madam, so they can hear you.

Q. Not what she usually does, Mrs. Graham; what happened on the morning of May 12? A. It was like any other morning. She got up and had her breakfast and left for school. Her father took her to school.

Q. About what time did she leave for school? 93
A. Approximately a quarter of nine.

Q. What school did she go to? A. Our Lady of Loretto Catholic School.

Q. Pardon? A. Our Lady of Loretto Catholic School.

Q. Where is that school located? A. On Greenwich Street in Hempstead.

Q. What were her school hours? A. From 9 to 3.

Mr. Goodman: Might I inquire as to whether the last gentleman in the jury box, Mr. Gatteau, can you hear her?

94 *Mynita Graham—for People—Direct*

Juror No. 7 (Mr. Gatteau): Just about hear her.

Mr. Goodman: I am experiencing considerable difficulty, your Honor. Would you request the witness to shout if necessary?

The Court: You will have to speak louder.

Mr. Cahn: Any time any of you gentlemen of the jury cannot hear, kindly advise us.

Q. You said her school hours were from 9 to 3? A. Yes.

95 Q. Could you tell us, Mrs. Graham, what Sunday was wearing that morning? A. School uniform which is a blue jumper, a white blouse, white shoes, a red sweater, a blue bow tie, and that is about the extent of it, I believe.

Q. Did she carry anything with her that day? A. Yes, she had her regular school books and she had a white purse.

Q. I show you this, Mrs. Graham, and I ask you if you can identify that for us, if you will. A. Yes.

Q. What is that, please? A. That is Sunday's

96 jumper.

Q. Was she wearing it on the morning of May 12th? A. Yes.

Mr. Cahn: I ask that it be marked for identification.

(Article of clothing referred to marked People's Exhibit 3 for identification.)

Q. I show you this and ask you if you can identify that for us, please.

97

Mr. Goodman: Mr. Cahn, I know you don't intend to do it, but when you stand between me and the witness I can't see.

Mr. Cahn: I would appreciate if you would stand over here because I have the clothing here. I won't do it except under these circumstances.

A. That is Sunday's blouse.

Mr. Cahn: I ask that that be marked for identification.

98

(Article of clothing referred to marked People's Exhibit 4 for identification.)

Q. I show you this article of clothing, Mrs. Graham, and ask you if you can identify that for us. A. That is Sunday's red sweater. Don't show me any more.

Mr. Cahn: I ask that it be marked for identification.

99

(Article of clothing referred to marked People's Exhibit 5 for identification.)

The Court: This is necessary for part of the case, Madam. You will have to bear up. Take a glass of water when you need it.

Q. I show you, with all apologies, Mrs. Graham, this article of clothing and ask you if you can identify that for us. A. Yes, that is Sunday's.

The Court: She says that is Sunday's. Mark it for identification.

100

Mr. Cahn: I offer it for identification.

(Article of clothing referred to marked People's Exhibit 6 for identification.)

Q. I show you that, Mrs. Graham, and ask you if you can identify that? A. That is Sunday's purse.

The Court: Mark it for identification.
Mr. Cahn: I offer it for identification.

101

(Purse referred to marked People's Exhibit 7 for identification.)

Q. Just one more, Mrs. Graham. Can you identify that for us?

By the Court:

Q. Is this Sunday's? A. Yes.

The Court: All right.
Mr. Cahn: I offer it for identification.

102

(Article of clothing referred to marked People's Exhibit 8 for identification.)

By Mr. Cahn:

Q. Mrs. Graham, I show you People's Exhibit 8 for identification and ask you if that was Sunday's belt, her belt? A. Sunday wore that belt but that was my belt.

Q. Thank you. Now, did you—are you able to continue, Mrs. Graham? A. Yes.

Q. Did you see Sunday at school on May 12th, 1958? A. Yes, I did.

Q. About what time, Mrs. Graham? A. About 2 o'clock in the afternoon.

Q. Did you say anything to Sunday at that time? A. Yes.

Q. What did you say to her?

Mr. Goodman: If your Honor please, I would most respectfully object upon the ground that it certainly would be hearsay and not binding upon the defendant.

Mr. Cahn: What the witness said.

The Court: I will take it. It is a statement of fact. It isn't a question of anything further than a fact that she said something, Overruled. 104

Mr. Goodman: I most respectfully submit—

The Court: He didn't ask what the child said; what she said to the child.

Mr. Cahn: I asked what she said to the child.

Mr. Goodman: I am sorry. I withdraw my objection.

105

By Mr. Cahn:

Q. What did you say to Sunday, Mrs. Graham? A. I told her—

Q. Keep your voice up, please. A. I told Sunday to hurry home. I had an appointment. I wanted to take her with me.

Q. Did you leave school at that time? A. I spoke with her principal after I spoke with her.

Q. Thereafter did you leave? A. Yes.

Q. Did you see Sunday thereafter? A. No.

106 *Mynita Graham—for People—Direct*

Q. What happened after you left school, Mrs. Graham? A. I picked up my little boy from the nursery.

Q. I am sorry, I didn't hear that myself. A. I picked up my little boy from the nursery. I went home.

Q. What is your little boy's name? A. Michael.

Q. How old is he ? A. He was 5 on the 25th of June.

Q. Is he the natural child of both you and your husband, Curtis Graham? A. Yes.

107 Q. Then what happened, Mrs. Graham? A. I usually—

Q. Not what you usually do. What did you do on that day?

The Court: Take a drink of water, Madam.

A. I waited for Sunday. She didn't come home.

Mr. Cahn: I didn't hear that. Would you repeat that, please?

(The last answer was read by the stenog-

108 rapher.)

A. (Continuing) And I got in my car and went the route that she is instructed to come and I didn't see her, and I went to the school and I asked one of the Sisters did she have to stay in and they said no, she left with the other children, and then I looked a couple different ways and I didn't see her and I went to my husband's work and I told him that she hadn't come home and we drove around a bit looking for her and then I notified the police.

Q. What police did you notify? A. I notified the Hempstead police.

Q. At about what time did you notify the Hempstead police department, Mrs. Graham? A. I don't remember—it could have been—it must have been around 5:30—I guess about 6 o'clock. I was trying to think of what had happened. 109

Q. Mrs. Graham, do you know the defendant, Willard Phillips? A. Yes.

Q. How do you know him? A. I was once married to him.

Q. When were you married to him? A. In 1936.

Q. Were you divorced? A. Yes.

Q. Where were you divorced? A. In Tampa, Florida. 110

Q. When? A. In 1943, I believe—'42 or '43. I don't remember.

Q. I show you this and ask if you can identify it for us. A. Yes.

Q. What is it? A. It is a divorce decree.

Q. From who? A. Willard Phillips.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: No objection.

(Paper referred to received in evidence and marked People's Exhibit 9.) 111

Q. Now, beginning in 1957, Mrs. Graham, did you begin seeing the defendant Willard Phillips again? A. Yes.

Q. Did there come a time, Mrs. Graham, when you started to become intimate with him? A. Yes.

Q. Now, on Thursday, May 8, 1958, did you see the defendant Willard Phillips? A. Yes.

Mr. Cahn: May I suggest, if you will, Mrs. Graham, to keep your head up and your voice out so that we can all hear you.

Q. Where did you see him? A. At his home.

Q. About what time? A. Oh, I don't know what time it was. It was in the evening.

Q. Did you have a conversation with the defendant Willard Phillips at that time? A. Yes.

Q. Would you tell us the conversation that you had with the defendant Phillips at that time, Mrs. Graham. A. Well, we had an argument.

Mr. Cahn: Keep your voice up, please.

113 Mr. Goodman: Might I respectfully request that that be stricken. It is merely a characterization, and the witness be instructed to give us in words or substance what he said.

The Court: All right, continue, Madam. What did he say to you and what did you say to him?

A. (Continuing) I asked him to leave me alone, to get out of my life.

By the Court:

114 Q. Now, I can't hardly hear you. Will you repeat it. A. I asked him to leave me alone and to get out of my life, and he said he would get out of my life but when he gets out he wasn't going out alone.

By Mr. Cahn:

Q. Did you see the defendant on Friday, May 9, 1958? A. I don't believe so.

Q. Did you see the defendant on Saturday, May 10, 1958? A. Yes.

Q. Where did you see him? A. I spoke with him on the street.

Q. About what time? A. It was after 9:30.

Q. Where on the street? A. What do you mean?

Q. What were the circumstances? Was that an arranged meeting? A. Well, yes. He knew I was coming out.

Q. Where were you going? A. I was going to the store to purchase something and I told him I was coming out.

Q. I can't hear you. A. I was going to the store, to the drug store, and I told him I was coming out, and when I came out to one of the 116
streets he was there and he followed my car down and I parked and he got out of his car and walked over to mine.

Q. Did you have a conversation with him at that time? A. Yes.

Q. What did he say to you and what did you say to him? A. It was on Saturday. I asked him what he wanted to see me about, we didn't have anything else to talk about, and he told me that I would be sorry for what the things I had said and he would get even with me, and I pulled off and left him standing there. 117

Mr. Cahn: I didn't hear that at all. Would you repeat it, please.

(Last answer read by stenographer.)

Q. You pulled off with your car you mean? A. Yes.

Q. Now, on Sunday, May 11th, did you see the defendant Willard Phillips? A. I couldn't say I saw him, I saw his car.

Q. Where? A. It was in the evening.

Q. Were you with anybody at the time? A. Yes, my family, my husband and two children.

Q. This was Mother's Day, was it not, Mrs. Graham? A. Yes.

Q. Now, tell us what happened. A. Well, I was parked—we had come from dinner.

Q. Mrs. Graham, talk to me so that your voice will carry this way, if you will, please. A. We had gone out to dinner.

Q. Who is "we"? A. My family and I gone out to dinner. We were just riding around and we parked on the street and were looking in the
119 store windows.

Q. You parked on the street what? A. We parked on the street and we were just looking in store windows.

Q. What street is this? A. Fulton Street in Hempstead.

Q. Yes? A. And I heard this sound as if a car puts on brakes very suddenly.

Q. Yes? A. And I looked up and I saw Mr. Phillips' car. I guess I must have seen him also because I was sure that it was he.

Q. Keep your voice up, please. A. I was on
120 one side of the street with one of the children and my husband was on the other side with the other one, and well, I thought he would say something to me and I took one of the children, the one that I had, and started across the street and then he pulled away after he saw that I was with my whole family.

Q. Did your husband know about your relationship with Willard Phillips? A. No. He knew that I was once married to him.

The Court: There will be a ten-minute recess.

Gentlemen of the jury, don't discuss this case amongst yourselves until you finally deliberate in the jury room.

(A short recess was thereupon taken.)

(After recess.)

Mr. Cahn: May I have the last question and answer, please.

(Last question and answer read by stenographer.)

By Mr. Cahn:

Q. Now, Mrs. Graham, again let me remind you to please keep your voice up and talk to me. Did you see or speak to the defendant Willard Phillips on Monday, May 12, 1958? A. I spoke with him on the telephone.

Q. About what time? A. Approximately around—

Q. Please keep your voice up, Mrs. Graham. A. I guess it must have been around 7 o'clock—6:30 or 7 o'clock, around that time.

Q. Was Sunday missing at this time? A. Yes.

Q. What did you say to him and what did he say to you? A. I told him that—

The Court: Speak up, Madam.

A. (continuing) I told him that my little girl is lost.

Q. I am not down there, Mrs. Graham, I am over here, please. A. I told him that my little

girl was lost and everybody was out looking for her, and that I had notified the police and would he help look for her. And he called and he asked me what was going on around my house.

Q. Please keep your voice up and look up, Mrs. Graham, if you will. It won't be much longer. A. I am sorry.

By the Court:

Q. What else happened, Madam? A. That was about the extent of the conversation. He asked me what was happening around my house. He saw the police there and I told him that my little girl was lost and everybody was looking for her, and would he please help look.

By Mr. Cahn:

Q. What did he say, if anything? A. He said he would.

Q. Did you see him that night at all? A. No, I didn't see him.

Q. Mrs. Graham, just one last question, if you will, and very quickly: Can you identify that for us? A. Yes, that is Sunday.

Mr. Cahn: Offered in evidence.

Mr. Goodman: If your Honor please, I fail to see the necessity for a photograph of the victim. I submit it accomplishes nothing except to arouse natural sympathy and I must object.

The Court: I have no way of knowing that. Do you object or not?

Mr. Goodman: I object.

The Court: Objection overruled. Put it in evidence.

Mr. Goodman: I respectfully except.

(Photograph referred to received in evidence and marked People's Exhibit 10.)

Mr. Cahn: You may examine, Mr. Goodman.

Cross-examination by Mr. Goodman:

Q. Mrs. Graham, would you please try to understand that what is about to happen is as much unpleasant to me as it is to you. Will you try to understand that? A. (Nodding head.)

Q. How long have you known Willard H. Phillips? A. Oh, since I was about 14 years old—maybe since 1935.

Q. 1935? A. That's right.

Q. Is that correct? A. That's right.

Q. Is it not true that in the intervening twenty odd years this man has brought you much happiness and much pain? A. Much more pain than happiness.

Q. And as you sit on that witness stand at this moment you are much more conscious of the pain that he has brought you than the happiness, isn't that true? A. Yes.

Q. Isn't that so? A. Yes.

Q. When was it that you married him? A. November, 1936.

Q. Did there come a time after your marriage to him that you saw fit to leave him? A. I left him many times.

Q. When you say that you had left him many

times, Mrs. Graham, can you give the jury an approximate number of times that you left him? A. No, I can't.

Mr. Cahn: Just a minute. I don't think that was testified to.

Mr. Goodman: She just said this moment that she had left him many times.

Mr. Cahn: The question as I understood, that you saw fit to leave him. "Did there come a time when you saw fit to leave him",
131 and I thought the answer was that she saw fit to leave him many times.

Mr. Goodman: Exactly.

The Court: That's right. Objection overruled. Go ahead, answer the question.

Q. Can you tell us approximately how many times during the course of your life together with Phillips you saw fit to leave him? A. No, I don't remember that.

Q. Would you say it was five? A. I don't remember how many times.

132 Q. Well, can you remember whether it was more than five? A. I don't remember how many times.

Q. In not being able to remember, Mrs. Graham, is it because it was so many times that you just can't count at this moment? A. I don't remember how many times I left him.

Q. Did you leave him only once? A. I know it was more than once.

Q. Was it more than twice? A. Yes, it was more than twice.

Q. I didn't hear your answer.

Mr. Cahn: Please keep your voice up.

A. Yes, it was more than twice.

Q. Was it more than three times? A. I don't know.

Q. Could it have been more than three times? A. It could have been, yes.

Q. I am sorry, I didn't hear you. A. It could have been, yes.

Q. Can you estimate how many times you left him before you finally divorced him? A. No, I don't know how many times.

Q. In any event, there were at least three occasions when you left him and then reconciled, is 134
that right? A. Possibly.

Q. I am sorry? A. Possibly.

Q. Now, on any of the occasions when you left him before you finally divorced him, did he ever strike you? A. Yes.

Q. After you had reconciled? A. Yes.

Q. Did he ever pursue and assault you because you had left him? A. He pursued me and assaulted me also.

Q. I didn't hear your answer. A. Yes.

Q. Is it your testimony, Mrs. Graham, that at least on one ocasion you saw fit to leave this de- 135
fendant, leave his bed and his board, and that thereupon he followed you and assaulted you; is that true? A. I don't understand you. What did you say?

Q. What I would like to know is, Mrs. Graham, whether or not on any of the occasions when you saw fit to leave Phillips he chased after you and assaulted you or did any bodily harm to you. A. Oh, it wasn't done that way, no.

Q. That's all I wanted to know. When was it that you finally got the divorce, a copy of the decree being in evidence, People's Exhibit 9?

Would you please look at it and tell us if refreshes your recollection as to when you divorced Phillips? When was it, Mrs. Graham? A. April, 1944.

Q. Mrs. Graham, is it not true that at some time after April, 1944, when you got that decree of divorce against Phillips—I will withdraw the question. Mr. Phillips knew that you had gotten the divorce from him, did he not? A. Yes.

Q. You saw that he was properly served with divorce papers, that you wanted him to know that
137 you were seeking the aid of the law to separate you from him forever, isn't that so? A. You say I was?

Q. Didn't you in preparing your action for divorce, or didn't your lawyer notify Mr. Phillips that you wanted a divorce? A. Well, I don't know how the lawyer does his work.

Q. Mrs. Graham, may I ask you in this fashion: do you know whether or not Mr. Phillips knew that you were trying to get a divorce from him? A. Well, I am sure he must have known.

Q. Did he make an attempt to assault you be-
138 cause you were seeking a divorce from him? A. No.

Q. Did he in any way molest or threaten you because he knew that you were trying to get a divorce from him? A. I'm not sure of that.

Q. In any event, you got the divorce in 1944, was it? A. Yes.

Q. Did you thereafter live as man and wife with Phillips? A. No.

Q. Did you have a job of some sort in Great Neck after 1944? A. I did.

Q. What type of employment was it? A. It was a domestic job. I took care of a little child, and housekeeper, I believe.

Q. Was it a sleep-in job for you? A. That's right.

Q. Didn't you bring Phillips to the home of these people for whom you were working and hold him out as your husband? A. No, I did not.

Q. Was he not hired? A. He was hired.

Q. To work for them? A. Yes.

Q. Did you arrange to see that he was hired? A. They needed someone. I knew Phillips and I told them. He came out and spoke with them and they hired him.

Q. But didn't you tell them that this man was 140
your husband? A. I told them that I was once married to him.

Q. Well, didn't you both sleep in on this job? A. We both did.

Q. Didn't you share an apartment in this home? A. We did not.

Q. Mrs. Graham, during this time didn't you know Mr. Phillips intimately? Do you know what I mean by that? A. Yes.

Q. And did you? A. I said yes.

Q. So that even though you didn't see fit to remarry the man you did know him sexually, did 141
you not? A. Yes.

Q. When was it at that particular period in your relationship with the man that it came to an end?

Mr. Cahn: I'm sorry, I didn't get that question.

The Court: Repeat the question.

(Question repeated by the Reporter.)

A. He went away.

142 Mr. Cahn: Just the date. Is that what you wanted?

Mr. Goodman: No. What was the answer, please?

The Witness: When he went away.

By Mr. Goodman:

Q. Mrs. Graham, wasn't Willard Phillips while employed in Great Neck at the same time you were employed and at the same time you were
143 knowing him intimately, convicted of the rape of a white girl?

Mr. Cahn: I want the record to show—

Mr. Goodman: Mr. Cahn, I am fully cognizant of what I have just done.

Mr. Cahn: I haven't finished my statement.

Mr. Goodman: I don't see any need for the District Attorney to make an observation. I have seen fit to take it upon myself to let the jury know about a prior conviction of my client.

144 Mr. Cahn: All right, and that's all I want the record to definitely show.

The Court: It does show that, Mr. Cahn. He asked the question.

Mr. Cahn: Well, this is my statement, your Honor. You realize if I did it it would be error?

The Court: But you didn't do it. Go ahead.

The Witness: Will you please ask the question again?

Mr. Goodman: Will you repeat it, Mr. Birchall?

Q. (Question repeated by the Reporter.) A. Yes.

Q. He was, was he not? A. Yes.

Q. You knew that, didn't you? A. I knew he was convicted, yes.

Q. Now, after his discharge from prison for that offense did you again come to know him intimately? A. Yes.

Q. When was he discharged? A. I don't know.

Q. Approximately. A. Well, that I couldn't tell you.

Q. Do you know that there came a time when 146
he was released from prison on probation or parole? A. Yes, I know that.

Q. And how long after he came out of the penitentiary did you resume your relations with him? A. Well, he went right back—he went away again shortly. I was told. When, I don't know.

Q. Did you know him intimately between the time of his release from the penitentiary and his subsequent return? A. No, I did not.

Q. Didn't you see him socially? A. Well, it wasn't social. I saw him, however.

Q. Do you know why he was returned to the 147
penitentiary? A. No, I never knew.

Q. Hadn't anyone told you what had happened? A. Well, the only person that I thought could have told me didn't know.

Q. When was he finally released from prison? A. Well, I believe it was around the Christmas of 1956.

Q. At that time you were married to Mr. Graham, were you not? A. Yes.

Q. And how long after his release from prison finally did you resume your relationship with him? A. Well, some months. I don't know.

Q. Well, would you say it was a week after he got out of jail? A. Oh, no, I said some months. I didn't say weeks.

Q. Can you give us an approximation of how long a period of time going back from this point this relationship carried on? A. No, I don't know.

Q. Isn't it true, Mrs. Graham, that you saw Mr. Phillips under circumstances where you had the opportunity to have sexual relationships at least once or twice every week during that period? A. During what period?

149 Q. From the time of his release up until the time of this tragedy. A. Not when he first came back.

Q. No, from the time that you took up with him after he finally got out up until the time of the tragedy. A. What was the question, please?

Q. Isn't it true that from the time you resumed seeing Phillips and up until the time of this tragedy that you saw him on an average of once or twice a week, during which time you had sexual relations with him? A. That is true.

Q. That is true, isn't it? A. Yes.

150 Q. Did you break off with him during that period of time? A. Yes.

Q. I beg your pardon? A. Yes.

Q. Isn't it a fact that you had numerous arguments with him during that period of time? A. Yes.

Q. He didn't assault you, did he, during that period of time, even though you had these arguments? A. Yes.

Q. He did? A. Yes.

Q. Incidentally, he knew Sunday, did he not? A. Yes.

Q. He never met the child in your home, did he? A. No, I don't think he saw her there.

Q. But you saw fit to bring Sunday into this man's company, did you not? A. She was in his company.

Q. As a matter of fact, the three of you went out very frequently on little social outings of sorts, did you not? A. Not frequently, no.

Q. Sometimes? A. We were out, yes.

Q. Sunday was an intelligent child. She knew that this man was not her father, isn't that true? 152

Mr. Cahn: I object to that.
The Court: Sustained.

Q. Did you tell her that this man was not her father? A. Sunday was 8 years old. I didn't have to tell her that. Sunday knew that.

Q. She also knew, she being a bright child, that Phillips was not a member of the family, did she not? A. She knew that.

Q. She also knew that you never saw fit to bring Phillips into your home where your husband could meet him, isn't that true? 153

Mr. Cahn: Objection.
The Court: Sustained.

Q. Now, getting back to the Thursday night before the tragedy, as you have described it to the District Attorney, what was the first time on that day that you were in contact with Mr. Phillips? A. Well, I'm not sure.

Q. Do you recall that you met him at or in Hempstead at about 4:30 on that afternoon? A. I don't remember that.

Q. Do you recall arranging with him on that day to take you to Roosevelt so that you could deliver some Avon products that you had been selling? A. Well, I don't know if arrangements were made prior, but he did take me.

Q. On that Thursday? A. I'm not sure of that.

Q. Well, would you say it did not happen on that Thursday? A. I said I'm not sure whether it was that Thursday or not. I said he did take me.

155 Q. Do you have a clear recollection of everything that occurred on that Thursday night when you told this man to get out of your life? Do you recall vividly what occurred on that night? A. I can't answer that question. If you answer a question for me then I will know it was that Thursday. Is that the Thursday that he took me to Roosevelt?

Q. I asked you that, Mrs. Graham. A. I know, but I'm not sure. That's why I can't answer you yes or no.

156 Q. Do you recall that there was a time a short time before the tragedy when you met Phillips somewhere and asked him to drive you to Roosevelt to deliver some Avon products? A. Well, I wouldn't say I asked him to drive me anywhere. I have my own car.

Q. Do you recall that there was a time shortly before the tragedy when you met Phillips and arranged to go together to Roosevelt to deliver some Avon products? A. We went to Roosevelt together and I did go to deliver some products.

Q. Now, before you went to Roosevelt to deliver the products did you go to his room? A. Well, of that I am not sure, because I think—I think—no, I went to his room after, I believe.

Q. In any event, you did tell Mr. Cahn that the conversation which you described took place in his room, is that right? A. That's right.

Q. Certainly not in your home; right? A. Yes, that's what I said.

Q. And certainly not out on the public street, isn't that true? A. Well, that was not impossible.

Q. I'm sorry, I didn't hear that. A. I said that was not impossible.

Q. But we want to know not what is or is not possible, but what happened, Mrs. Graham. A. What you are speaking about happened in his 158 room.

Q. Precisely. And this was on the Thursday night before the tragedy with Sunday, isn't that so? A. Yes.

Q. And I now ask you whether or not before going to his room you had ridden in an automobile with Phillips to Roosevelt for the purpose of delivering some cosmetic products? A. I also told you I don't know if that was the same Thursday or not. I don't know whether Thursday I went alone and delivered—or whether I delivered or not. But I do go to his home on Thursday eve- 159 ning.

Q. You have no doubt of being in his room on that Thursday and of telling him that you wanted no more part of him. That is true, is it not? A. Yes, that is true.

Q. Now, tell us whether or not you said that to him before or after you had sexual relations with him in that room that night. A. I did not.

Q. You didn't what? A. I didn't have sexual relations with him in that room that night.

Q. Did he force you to come in his room that night? A. No, he has never forced me to come to his room.

Q. You went voluntarily, did you not? A. Yes.

Q. You do not now recall whether or not you went after having first been with him in Roosevelt on an errand for you? A. Well, if that was the day that I went to Roosevelt then being in his room was after, because this was in the evening.

Q. Mrs. Graham, you then saw him on the following Saturday, is that right? A. That's right.
161 Saturday evening.

Q. And if I recall your testimony correctly, you came out of your home and there he was, is that right? A. I met him on the street, yes.

Q. Near your home? A. Well, it isn't too terribly far. You could call it the same section.

Q. Well, had you been in communication with Phillips between Thursday when you told him to get out of your life and Saturday when you bumped into him? A. Well, that wasn't a chance meeting. That wasn't a bump in.

Q. Then you did arrange this meeting, didn't
162 you? A. Yes, that was arranged Saturday maybe—when I saw him it was near 10 o'clock in the evening because why I remember it was I wanted to get to the drugstore before it closed, and it usually closes around 10.

Q. How were you in communication with him between Thursday and that time to arrange this meeting? A. That was by telephone.

Q. I'm sorry, I didn't hear your answer. A. That was by telephone.

Q. Who called whom? A. I'm not sure of that.

Q. This is very important, Mrs. Graham. Let us know. Did you call him to make this date? A. I don't remember that.

Q. Could you have? A. Possibly, yes. I have called him.

Q. In any event, you were in telephone communication with him and arranged a meeting for Saturday at around 10 o'clock at night, isn't that so? A. No, it wasn't done like that. When we spoke on the telephone I told him I was coming out to the drugstore and if there was anything to be said it could be said then. That was about the extent of the conversation, more or less.

Q. But you still don't recall whether you called him, is that so? A. That's right. 164

Q. Isn't it true that you went shopping that Saturday night? A. I'm not sure of that. I don't usually go shopping on Saturday night.

Q. Well, try to recall this particular Saturday night. Isn't it true that both you and Phillips together went shopping and that he helped you with the bundles? A. No.

Q. You are positive of that? A. Not Saturday night. I am sure of that.

Q. Well, where did you leave him after meeting him that Saturday night? A. Standing right near my car. 165

Q. At the point where you met him? A. Right at the point where I met him.

Q. Mrs. Graham, you want this man to pay the penalty for what he has done, don't you?

Mr. Cahn: Objection.

Mr. Goodman: I think the state of the witness' mind is most important, if your Honor please.

Mr. Cahn: Objection.

The Court: Sustained as to the question.

166 *Mynita Graham—for People—Cross*

Mr. Goodman: Will the Court indulge me just a moment?

By Mr. Goodman:

Q. Mrs. Graham, did you personally see Phillips between the Thursday night in his room and the Saturday night when you met him near your automobile? A. Yes.

Q. Didn't you meet him on that Saturday morning, Mrs. Graham? A. Yes, I saw him Saturday
167 morning.

Q. Didn't you go shopping together with him? A. It was not a meeting. You asked me did I see him, didn't you?

Q. Yes. A. Yes, I saw him.

Q. Didn't you go shopping with him in the Safeway store that Saturday morning? A. I was in the Safeway shopping and he saw my car and he came in the Safeway where I was.

Q. And didn't you spend time shopping together in the store that morning? A. I did my shopping.

168 Q. Wasn't he with you helping you with the bundles? A. He was not helping me.

Q. Didn't carry them for you? A. No, he didn't carry my bundles for me. He didn't have to. I had a cart.

Q. How long did he remain with you that morning? A. He stayed until I left.

Q. From the store or from some other point? A. No, from the store. Whatever time he came in when I was shopping he stayed there until I got my parcels and drove away.

Q. Did you call any police and complain that this man who was not your husband was molesting you that day? A. No, I did not.

Mr. Goodman: No further questions.
Mr. Cahn: Thank you, Mrs. Graham.

RAYMOND S. SMITH, called as a witness on behalf of the People, being first duly sworn, testified as follows: 170

By the Clerk:

Q. What is your full name, sir? A. Lieutenant Raymond S. Smith, Hempstead Police Department.

Direct examination by Mr. Cahn:

Q. Lieutenant Smith, how long have you been a member of the Hempstead Police Department? A. 24½ years, sir.

Q. And were you on duty on May 12, 1958? A. Yes, sir, I was. 171

Q. And did you have a conversation with one Curtis Graham on that day? A. Curtis Graham? Yes, sir.

Q. About what time? A. That was late in the evening, around 10:15 P. M.

Q. Did you have a conversation with Mrs. Graham? A. Yes, sir, I did.

Q. And what time was that? A. That was at 5:46 P. M.

Q. 5:46? A. Yes, sir.

172 *Raymond S. Smith—for People—Direct*

Q. And as a result of that conversation what did you do?

Mr. Goodman: Which conversation?
Mr. Cahn: With Mrs. Graham.

A. As a result of the conversation with Mrs. Graham, which was by telephone—she reported her little girl—

Mr. Cahn: Well, don't tell us—
173 Mr. Goodman: I won't make any objection.
The Witness: I sent out a missing persons alarm for a little girl.

Q. And what else did you do, if anything? A. I sent an officer to 10 Seabury Street, which is the residence of Mrs. Graham, to get a report of a missing person, and the officers conducted an extended search looking for the girl all over every place that they could think of. And the officer came back and made a report of a missing person and I caused an alarm to be sent.

174 Q. And did there come a time when you notified the Third Squad? A. Yes, sir.

Q. About what time was that? A. 10:15 p. m., that is when Mr. Curtis Graham came into police headquarters.

Q. Did anybody report from the Third Squad to the Hempstead Police Department? A. Yes, sir, they did.

Q. Who was that? A. That was Det. Rofheart and Det. Walkowski.

Mr. Cahn: You may examine.
Mr. Goodman: No questions.

175

RITA RUSKAY, called as a witness in behalf of the People, first being duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. My full name is Rita Ruskay, R-u-s-k-a-y.

Q. Where do you live? A. 445 Leonard Boulevard, New Hyde Park.

Direct examination by Mr. Cahn:

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Q. Mrs. Ruskay, did you know the deceased, Sunday Graham? A. Yes, sir.

Q. How did you know her? A. She was a student in my classroom.

Q. At what school? A. At Our Lady of Loretto School.

Q. Did you see Sunday Graham on May 12, 1958? A. Yes, sir.

Q. Were you with her throughout the day? A. Yes, sir.

Q. Until what time? A. Until dismissal at ten minutes to 3.

177

Q. Did there come a time that day, Mrs. Ruskay, when Sunday had lunch? A. Yes, sir.

Q. Do you know what she ate? A. Yes. She had a sandwich, apple, some cookies and milk.

Q. How did you know that? A. Because I had to get it for her. She had forgotten her lunch that day.

Q. About what time did she eat? A. About ten minutes to 12.

178 *Rita Ruskay—for People—Direct*

Q. Did you see Mrs. Graham that day? A. Yes, sir.

Q. About what time? A. Somewhere around 1 o'clock, between 1 and 1:30 or thereabouts. I am not sure.

Q. Did there come a time when Sunday left school? A. Yes, sir.

Q. About what time was that? A. Ten minutes to 3, when the bell rings.

Q. Where was the last place you saw Sunday Graham? A. I saw her walking down the center
179 walk to cross the street at Greenwich Street.

Q. Was that the last time you ever saw Sunday Graham? A. That was the last time I saw her, yes.

Mr. Cahn: Thank you; you may examine.

Mr. Goodman: No questions.

Mr. Cahn: Kathy Mullin. She is 11 years old, your Honor.

By the Court:

180 Q. How old are you, Sis? A. 11½.

Q. When were you 11½? A. November.

Q. All right. Do you know what an oath is to tell the truth? A. Yes.

Q. What does it mean? A. It means to tell the truth.

The Court: All right, swear her.

 181

KATHLEEN MULLEN, called as a witness in behalf of the People, first being duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Kathleen Mullen.

Q. Where do you live? A. 137 Alabama Avenue, Hempstead.

Direct examination by Mr. Cahn: 182

Q. Kathy, do you remember me? A. Yes.

Q. We have spoken before? A. Yes.

Q. Did you know Sunday? A. Yes.

Q. How did you know her? A. As a friend.

Q. Do you go to school? A. Yes.

Q. What school do you go to? A. Our Lady of Loretto.

Q. That is how you knew Sunday? A. Yes.

Q. Do you remember the last time you saw Sunday? A. Yes.

Q. When was that? A. On May 12th. 183

Q. How do you know it was May 12th? A. I mean May 13, because it was the day after Mother's Day.

Q. May 13—are you sure? A. Yes.

Q. Are you sure of that day? Well, it was the day after Mother's Day that you saw her? A. Yes.

Q. Now, where were you when you saw Sunday for the last time? A. For the last time?

Q. Yes. A. I was between Cruikshank and Milk Maid. There is a street in between.

184 *Kathleen Mullen—for People—Direct*

The Court: You have to speak up so the last man in the jury box can hear you.

Q. Kathy, keep your voice up, all the way up, as if you were reciting in school. All right? A. O. K.

Q. You say you were between Cruikshank and Milk Maid? A. Yes.

Q. Milk Maid is a store or a building I presume? A. Yes.

Q. Do you know what street Milk Maid is on?
185 A. Greenwich.

Q. And you were between Greenwich and Milk Maid? A. No.

Q. Well, you explain that to us. A. Well, here is Cruikshank, then there is another street, and then Milk Maid (indicating).

Q. I see, and you were between Cruikshank and Milk Maid? A. Yes.

Q. Now, where was Sunday when you last saw her? A. She wasn't on the path. She was next to the Paraglide on Greenwich.

Q. She was next to the Paraglide on Green-
186 wich? A. Yes, she was in the parking lot.

Q. Then what did you see? A. We asked—

Q. Don't tell us what you said to anybody or what anybody said to you. What did you see in reference to Sunday? A. I saw Sunday go into a car.

Q. Where was the car? A. On Cruikshank.

Q. What kind of car? A. A black car.

Q. Anything else that you recognized about it or that you remember about it? A. It had white wheels, whitewall tires I should say.

Q. Was anybody in the car at the time she got in? A. Yes.

Q. Who? A. A man.

Q. Did you see what kind of a man? A. He was a colored man.

Q. Could you see his face? A. No.

Q. To recognize him? A. No.

Q. Could you see what he had on? A. He had on a tan jacket and a white cap.

Q. The car was on Cruikshank Avenue? A. Yes.

Q. And you say you saw Kathy get into that car? A. No.

Q. I am sorry, Sunday get into that car? A. 188
Yes.

Q. Kathy, I show you this and ask you if you can identify that for us. A. It looks like the car.

Q. It looks like what car? A. The car that Sunday Graham had gotten into it.

Mr. Cahn: I ask that it be marked for identification.

(Photograph referred to received and marked People's Exhibit 11 for Identification.) 189

Q. Kathy, I show you this and ask you if you can identify that for us? A. It looks like the cap he was wearing.

Mr. Cahn: I ask that it be marked for identification.

(Cap referred to received and marked People's Exhibit 12 for Identification.)

190 Q. And I show you this and ask you if you can identify that for us. A. It looks like the coat—I mean the jacket. It looks something similar to that.

Mr. Goodman: I didn't hear what the child said.

The Court: Repeat it.

The Witness: It looks something similar to the coat—I mean the jacket.

Mr. Cahn: I ask it be marked for iden-
191 tification.

(Jacket referred to received and marked People's Exhibit 13 for Identification.)

Q. Now, Kathy, you don't know, do you, that that is the car or that is the cap or that is the jacket that the man in the car was wearing, do you? A. No.

Q. Now, thereafter did you speak to detectives? A. Yes.

Q. Did you tell them what you had seen? A.
192 Yes.

Q. When did you talk to the detectives? A. The day after it happened.

Mr. Cahn: You may examine, Mr. Goodman.

The Court: Will it be an extensive cross-examination?

Mr. Goodman: No, it won't be extensive, five minutes at the maximum.

The Court: All right.

Cross-examination by Mr. Goodman:

Q. Kathy, at the time you last saw Sunday, were you walking with her or was she walking in front or behind you? A. She was walking—I was over here and she was about over here (indicating).

Q. That is hard for me to understand, Honey. Were you walking together? A. No.

Q. Was she in front of you or behind you? A. She was, you would sort of say, beside me.

Q. But you actually weren't walking along with 194
her? She was walking on her own errand and you were on yours, is that right? A. Yes.

Q. Would you say that she was as far away from you as I am now? A. No.

Q. Closer? A. Farther.

Q. I will walk back, and when I am at a point where you think it is about the same distance that she was from you you tell me to stop. A. O. K.

Q. Further? A. About that far.

Q. Were you on the sidewalk on Greenwich Street? A. No, we went through a lot. 195

Q. Were she and you both crossing through this lot near the Paraglide Restaurant there in Hempstead when you last saw her? A. Yes.

Q. Were you both walking in the same direction? A. Yes.

Q. Well, can you recall if she was to your right or to your left? A. To my left.

Q. Let us draw a little diagram, Kathy, so we can understand exactly how the two of you were walking along that day.

Mr. Goodman: Do you want to watch me on this, Mr. Cahn, please.

Q. I have made a very rough sketch, Kathy, and will you look at it and tell me whether that pretty much looks the way that Cruikshank, Greenwich and the Paraglide Restaurant were on that day. Do you recognize that? A. Yes.

Q. Would you take my pencil, please, and mark where you were on that little diagram when you saw Sunday get into the automobile.

197

The Court: Put a "C" which stands for Cathy.

A. About here, and she would be here (indicating).

The Court: Put an "S" there.

(Witness writes on diagram.)

Mr. Goodman: Suppose we let the jury see this, if your Honor please.

Mr. Cahn: Only if it is marked in evi-

198 dence.

Mr. Goodman: The point is well made.

By Mr. Goodman:

Q. Now, Kathy—excuse my back, gentlemen—Kathy, you have put a C at a point closer to Cruikshank Avenue than Greenwich Street, is that right? A. Yes.

Q. And you have put an S for Sunday further away from Cruikshank than you were, is that right? A. We were about the same distance.

Q. Speak up so that Mr. Gatteau way back there can hear you, all right? A. O. K. There is where Sunday was, and I was about—here would be the path over here and I would be—here would be the lot where all the cars are parked. There were just a few cars, and she went over here to get to the car that was here and she was over here. Now, I would be about—I was about in the middle of the lot. It would be about here (indicating).

Q. Kathy, isn't it true that you were walking on a path from Greenwich Street across towards Cruikshank? A. No. 200

Q. Where did the path run from? A. Here would be that other road, and about in the middle—not in the middle—here is the block. It would start here and it would go across and around like that (indicating).

Q. In other words, then, you and Sunday both walked on a path from the street behind Cruikshank Avenue back of the Paraglide Restaurant through the lot there, is that right? A. Sunday didn't. I went on the path over here, and she went—it would be about here—this is where the 201 path would go. Sunday would be right here, and she walked around the Paraglide on this grass and then into the lot, and then crossed over by the hedge and got around in back of the car (indicating).

Q. Did she leave school before you did that afternoon? A. Yes, I believe she did.

Q. You didn't plan to walk with her that day, did you? A. No.

Q. And both of you, after leaving school, went out together, walked behind this Paraglide Restau-

rant in Hempstead and then across the parking lot? A. The path is not on the parking lot. There is grass in between to separate the parking lot from the path and we were walking on the path, and she was walking on the parking lot.

Q. But was she closer to Cruikshank Avenue when she started toward the automobile than you were or were you closer to Cruikshank Avenue? A. Well, I couldn't say that because when I looked up to see her she was near the hedges on the sidewalk of Cruikshank.

203 Q. The first time that you noticed Sunday after leaving school that afternoon was when you saw her near the hedge, is that right, dear? A. No, the first time I saw her was in about the same distance where I was.

Mr. Goodman: May I suggest that we recess and continue after lunch.

The Court: We will recess until 2 o'clock. Gentlemen of the jury, you are not to discuss this case among yourselves nor formulate an opinion until you deliberate in the jury

204 room at the end of the case. The law requires me to admonish you in this fashion each and every time there is a recess, so it will be quite repetitive before it is over.

(A luncheon recess was thereupon taken.)

AFTERNOON SESSION.

KATHLEEN MULLEN, a witness previously called on behalf of the People, having been duly sworn, resumed the stand and testified further as follows:

Mr. Goodman: At this time, if your Honor please, the defendant offers in evidence Section 34, Block 360, of the land map of the County of Nassau as supplied for us by the 206
County Clerk of this county.

Mr. Cahn: No objection.

(Map received in evidenced and marked Defendant's Exhibit A.)

Cross-examination by Mr. Goodman (Con't):

Q. Kathy, as you were walking behind the Paraglide that afternoon were there any other children with you? A. Yes.

Q. How many? A. My sister and Sunday's girl friend. 207

Q. Sunday's girl friend? A. Yes, she was walking with Sunday.

Q. There was another girl who was walking with Sunday? A. Yes.

Q. So that Sunday was in company with one girl and you were walking with your sister, is that right, dear? A. Yes.

Q. When you first noticed that car into which Sunday went was it moving or was it standing still? A. I noticed it when it was standing still.

Q. You didn't see it drive up and stop, is that it? A. Yes.

Q. You didn't? A. No.

Q. Did you ever see that car after that day? A. Yes.

Q. Now, you saw a car that looked like it, isn't that right? A. Yes.

Q. Did the detectives take you and show you an automobile? A. Yes.

Q. And did they say, "Does this look like the car that you saw the other day?" A. Yes.

Q. They said that to you, didn't they? A. Yes.

209 Q. Did they also show you the jacket and the cap that you saw in court today? A. Yes.

Q. And did they ask you if the jacket and the cap looked like what you thought you saw the man wearing that day? A. Yes.

Q. Who took you to the Police Department in the first instance, Kathy? How did you get to them to tell them what happened? A. Two detectives came to school and they took me to the Police Department.

Q. I can't hear you. A. They took me to the Police Department.

210 Q. How did they know to come to you to take you there, Kathy? A. Well, I had asked the Sister and she said the third grade had said that I played with Sunday and that I was with her at that time.

Q. Now, Kathy, would you mind standing right here, please? A. Yes, sir.

Q. Do you see this map which is on the easel in front of you? A. Yes.

Q. And, incidentally, that map is in evidence in this case. Does it look familiar to you as to the layout of the streets? A. Yes.

Q. Did you see that Greenwich Street appears on the map over on the righthand side? A. Yes.

Q. And do you notice that at the bottom of the map, and running at right angles to Greenwich Street is Cruikshank Avenue? A. Yes.

Q. And then just above it the next street is—I guess it is pronounced Angevine Avenue. A. Yes.

Q. Right? A. Right.

Q. And then the next street immediately to the north and parallel is Eldridge Avenue? A. Yes.

Q. Isn't it true that Our Lady of Loretto School 212
is on the other side of Greenwich Street, and I am indicating to the right of the map, across the street from the Milkmaid? A. Yes.

Q. And is the Milkmaid in this section of the map facing on Greenwich Street between Angevine and Eldridge Avenue? A. Yes.

Q. And is the Paraglide Restaurant also facing Greenwich Street between Angevine and Cruikshank Avenue? A. Yes.

Q. Now, is it true that that afternoon you crossed Greenwich Street from the school over to where the Milkmaid is? A. Yes. 213

Q. And then you walked down the sidewalk on the left side of Greenwich Street, or we would say the west side of Greenwich Street? A. We walked through the parking lot.

Q. You are speaking of the parking lot behind the Paraglide? A. We had our bicycles.

Q. But, dear, what I want to know is this: the parking lot of which you now talk, isn't that behind the Paraglide? A. No, that is the parking lot of the Milkmaid.

Q. Oh, there is a parking lot there, is that right? A. Yes.

Q. Is the parking lot behind the Milkmaid and away from Greenwich Street? A. It is on the side entrance, I think.

Q. Now, when you walk through that parking lot do you walk behind the Milkmaid? A. No.

Q. In front of it? A. Yes.

Q. And you crossed in front of the Milkmaid and through the parking lot and did you come onto Angevine Avenue at some distance in and away from Greenwich Street? A. Yes.

215 Q. Were you at about a point equal to the rear part of the Paraglide Restaurant? Do you know what I mean? A. Yes.

Mr. Goodman: With the permission of the District Attorney I should like to indicate on the exhibit the relative position of the Paraglide Restaurant. Do I have your consent?

Mr. Cahn: Certainly.

Q. Do you see that red marking that I have now made on this map, Kathy? A. Yes.

Q. Is that approximately the way the Para-
216 glide Restaurant fits into that section on the map? A. Yes.

Q. Is your answer yes? A. Yes, I think so.

Mr. Cahn: May I suggest you mark that box with the letter P so that we will know what we are talking about?

Mr. Goodman: It is done (marking).

Q. Kathy, when you came across that parking lot by the Milkmaid you came out onto Angevine Avenue, is that right? A. Yes.

Q. When you came on to Angevine Avenue were you down around further away from the rear of the Paraglide? Do you see what I now mean, or did you come out alongside of the Paraglide? A. We came out the rear but it was down a little.

Q. Let's see if we understand each other. Did you cross Angevine Avenue and come out on the same side where the Paraglide is? A. No.

Q. Didn't you cross Angevine Avenue? A. We came down across here onto Angevine and then we went down a ways and then crossed over. 218

Q. Yes. You did cross Angevine to get over onto the other side, didn't you? A. Yes.

Q. And when you crossed Angevine Avenue didn't you come on this side of Angevine down around quite behind the Paraglide Restaurant? A. Yes.

Q. Is that right? A. Yes.

Q. Isn't it true that at the point where you came onto Angevine Avenue, the south side or the side where the Paraglide Restaurant is, that there is a path that goes across the back of the parking lot out onto Cruikshank Avenue, is that 219 right? A. Yes.

Q. Now, isn't it also true, Kathy, that there is another path up closer to the Paraglide which also goes behind the Paraglide? A. That's isn't a path.

Q. It isn't a path? A. No, it is a sidewalk and then there is that parking lot.

Q. In any event, there is another place at which you children can cross behind the Paraglide to get to Cruikshank besides the path that you took? A. Well, they cross over into the parking lot.

Q. Yes, but that is true, isn't it? A. Yes.

220 Q. Now, on this day isn't it true that you and your sister came out to this first path that you have just described? A. Yes.

Q. And that Sunday was over on this other place closer to the Paraglide; is that right? A. Yes.

Q. And was she about the same distance to your left? In other words, you weren't any more close to Cruikshank than she was? Do you follow what I mean? If you don't understand, tell me. This little path coming across this lot, were you any
221 nearer to Cruikshank Avenue than she was? A. I think we were both about the same.

Q. About the same? And you said that as you were crossing she was about from here to the railing away from you and to your left, isn't that correct? A. Yes.

Q. And you were walking with your sister? A. We had a bicycle.

Q. Were you riding on the bicycle or pushing it? A. We were riding it.

Q. Was Sunday on a bicycle? A. No.

Q. That parking lot back there in which you
222 were riding your bicycle is quite bumpy, isn't it?

Mr. Cahn: Just a moment. She didn't say she was riding in the parking lot.

Q. The path on which you were operating your bicycle across behind the Paraglide, was that fairly bumpy? A. Yes, but—

Q. Well, it is fairly bumpy, isn't it? A. Yes.

Q. And it was that day, wasn't it? A. Yes.

Q. You had to watch where you were going with your bicycle because of that bumpy area, isn't that true? A. Yes.

223

Q. You say that you didn't see the automobile come to a stop but that you saw the automobile into which Sunday finally got, is that right? A. Yes.

Q. Now, tell me in which direction was that automobile facing? Which way, from Greenwich Street or towards Greenwich Street? A. Towards Greenwich Street. The front of the car was—

Q. Facing towards Greenwich Street? A. Yes.

Q. Do you know which is the right side of a street for a car to stop on and which is the wrong side? A. No.

224

Q. Well, do you know whether or not that car when it was facing Greenwich Street was closer to this side of Cruikshank Avenue (indicating) or closer to the other side, the right side of Cruikshank Avenue? A. I think it was either in the middle of the road or over that way (indicating). It was over here somewhere.

Mr. Goodman: Indicating the right side of Cruikshank Avenue, or, rather, the southerly side of Cruikshank Avenue.

225

Q. Now, were you in the middle of this area behind the Paraglide at the time that Sunday went to that automobile? A. Yes.

Q. Would you like with a pencil to indicate for us with an X-mark about where you were on your bicycle at the moment you saw Sunday go into that automobile? You don't have to worry about them watching you do it. Just put it on there. A. Well, here is the path and we were about in the middle of the path (indicating).

Q. Would you mark it with an X mark, just about where you think you were at the time you

saw Sunday go to that automobile? A. (Witness marks on map.)

Q. Now, in addition to yourself and your sister— A. And my other sister.

Q. Two sisters? Were they both with you? A. Yes.

Q. And Sunday and her friend, were there any other children in this lot the time you saw Sunday go to the car? A. No.

Q. Do you know about how wide Cruikshank Avenue is at that point where the car was parked?

227 A. No.

Q. Would you say that it is as far as from where you are to the railing, indicating the second railing where that officer is sitting? A. I don't know.

Q. Do you think Cruikshank Avenue is wider than that distance or less wide? A. I think it is about maybe that size.

Q. About that? A. Yes.

Q. And how about the distance from where you have made this X mark where you say you were, to this side or the north side of Cruikshank

228 Avenue? Would you say it is about the same or more? A. I don't really know.

Q. Do you recall that there was a hedge— A. Yes, there was.

Q. Let me finish, please. Running along the north side of Cruikshank Avenue from Greenwich Street to where there was a door into that parking lot? A. Yes.

Q. There was on that day, was there not? A. Yes.

Q. Can you tell us with relation to your own head how high that hedge is? Was it about the same height or above your head or below? A. I

think it was standing up this way about like that (indicating).

Q. In other words, it was about this step higher than your head, is that right? A. Yes.

Q. Was this car into which you saw Sunday go on the corner down around past the end of that hedge? A. No, the front of the car was about the beginning of where the end of the hedge ended. The hedge would come about here and the car would probably be about there (indicating).

Mr. Goodman: May the record indicate 230
that the witness indicates that the front of the automobile was at a point slightly to the west of the westerly end of the hedge?

I have no further questions.

Mr. Cahn: Thank you, Kathy.

NORMAN ROFHEART, called as a witness on behalf of the People being first duly sworn, testified as follows:

By the Clerk: 231

Q. What is your name? A. Detective Norman Rofheart.

Q. Shield number and squad? A. Shield 91, third squad.

Direct examination by Mr. Cahn:

Q. Detective, how long have you been a member of the Nassau County Police Department? A. Nine and a half years.

232 *Norman Rofheart--for People—Direct*

Q. And on May 12, 1958 were you on duty? A. Yes, sir, I was.

Q. Did you receive a report of a missing person that day, sir? A. Yes, sir.

Q. At about what time? A. I was notified by Lieutenant Smith at about 10:20.

Q. And what, if anything, did you do, sir? A. I proceeded to the Hempstead Police Department and spoke with Mr. Graham.

Q. And as a result of that conversation what did you do? A. Mr. Graham gave me a description of his daughter and the clothes she was wearing, and we went to his house and spoke with Mrs. Graham. We conducted a search of the area that she usually takes from school, and this search continued most of the night.

233

Q. The following morning did you do anything in reference to this case, Detective Rofheart? A. Yes, sir, I did.

Q. And what was that? A. At the Lady of Loretto School we spoke to classmates of Sunday Graham. It was learned from one of the students—

234

Mr. Goodman: I object to that, if your Honor please.

Q. Don't tell us what anybody told you, Detective; tell us just what you did. A. We spoke to the students at the school and from then we went to the home of Willard Phillips at 38 Garfield Place in Hempstead.

Q. Did you speak to Kathy Mullen that morning? A. Yes, sir, I did.

Q. Was that the first time you had spoken to her? A. Yes, sir, it was.

Q. Now, did you have a conversation with her in reference to this case? A. Yes, sir, I did.

Q. Now, after that what did you do? A. I proceeded to 38 Garfield Place in Hempstead and spoke with Willard Phillips.

Q. Now, what did you say to him and what did he say to you?

Mr. Goodman: If your Honor please, at this time the defense is obliged to renew its motion that all witnesses for the prosecution be excluded from the courtroom, and I am 236 obliged to specifically direct my motion to Detective Stark.

By the Court:

Q. Did anybody accompany you at that time? A. Yes, sir.

Q. Who was with you? A. Well, Detective Stark was not there.

Q. Was detective Stark there? A. He was not there.

The Court: Motion denied. 237

By Mr. Cahn:

Q. I believe the last question I asked of you, Detective Rofheart, was what did you say to the defendant Willard Phillips and what did he say to you? A. Well, I asked him about his actions on the previous day and where he had been and if he had seen Sunday Graham. He said he had not.

Further, we made a search of his house and his room. In his closet I found a white cap and

a tan jacket which he claimed to have been wearing the day before. We asked him to accompany us to the third precinct station house, which he did.

Q. I show you this People's Exhibit 12 for identification, sir, and ask you if you can identify that for us. A. Yes, sir, I can.

Q. What is that, sir? A. I have my initials in the band. This is the hat that I found in Willard Phillips' closet.

Q. And is that the hat to which you refer that
239 he said he was wearing the day before? A. Yes, sir, it is.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: May I inquire of the witness?

The Court: Yes.

Cross-examination by Mr. Goodman:

Q. Detective, did you state that you had placed your initials in this cap somewhere? A. Yes,
240 sir, I did.

Q. Would you please point out to us where? A. (Witness indicates.)

Q. At what point were these initials put in there by yourself? A. At the third precinct.

Q. Not at the time you had actually picked up the cap in the defendant's home, is that correct? A. No, sir, he wore it to the third precinct.

Q. Was it under your personal observation every moment from the time you first saw it until the time when you put your initials in it? A. Yes, sir, that is correct.

Q. And where has the cap been from that point until today? A. The cap was turned over to Inspector Pribyl.

Q. So that it has not been in your personal possession or under your personal observation from that day until today, is that correct? A. No, sir, it has not.

Q. Is there anything about this cap which identifies its manufacture, its make or its model? A. I don't believe so, no, sir.

Mr. Goodman: No objection. 242

The Court: Received in evidence.

(Cap heretofore marked People's Exhibit 12 for identification now received in evidence and marked People's Exhibit 12 in evidence.)

By Mr. Cahn:

Q. I show you this jacket, sir, and ask you if you can identify that for us. Yes, sir, this is the jacket I took from Phillips' closet.

Q. And is that the jacket you say he told you he was wearing the previous day? A. Yes, sir, this is the jacket. 243

Mr. Cahn: I offer it in evidence.

By Mr. Goodman:

Q. Did you put some mark or other to identify this jacket at the same time? A. Yes, sir, that is correct.

Q. How? A. By my initials.

Q. I notice that there appears in green ink inside the jacket the initials W.H.P. Were they placed there by the defendant? A. Yes, sir.

Q. At your direction? A. No, sir.

Q. Is there anything about this jacket, Detective, which in any way identifies its manufacture, make or model? A. I don't believe so, no, sir.

Mr. Goodman: No objection.

(Jacket heretofore marked People's Exhibit 13 for identification now received in evidence and marked People's Exhibit 13 in evidence.)

245

Q. Detective Rofheart, did you have a conversation with the defendant in reference to his automobile? A. Yes, sir. His automobile was parked in front of 38 Garfield Place and I asked Phillips if that was his car and he said it was.

Q. I show you People's Exhibit 11 for identification, sir, and ask you if you can identify that for us. A. Yes, sir, that is the car.

Q. That is which car? A. That was parked in front of Phillips' house and the car that he said was his.

246

Mr. Cahn: I offer the picture in evidence.

Mr. Goodman: No objection.

(Photograph of car heretofore marked People's Exhibit 11 for identification now received in evidence and marked People's Exhibit 11 in evidence.)

By Mr. Cahn:

Q. I believe you told us, Detective Rofheart, that you asked the defendant, Willard Phillips, to come to the third precinct station house? A. Yes, sir, that is correct.

Q. About what time was this? A. We got to the third precinct at about 1:15 P. M.

Q. And what happened there? A. Phillips was brought to the third squad office and I questioned him.

By the Court:

Q. Pardon me, what time did you get to the precinct? A. At about 1:15 P. M. on the 13th.

Q. On the 13th? A. Yes. I questioned Phillips in reference to his activities the previous day, 248
May 12th, and he told me he had been out looking for a job in Farmingdale, that he had come back to Hempstead at about 11 o'clock that morning and he had gone to the Hempstead bus terminal for, I believe, coffee and orange juice—

Mr. Goodman: May I interrupt, Detective? I think it important at this point that the Court determine whether or not Detective Stark was present now, at this point.

The Witness: Detective Stark was not present.

249

Mr. Goodman: May I have some assurance from either the witness or the District Attorney that when the witness' testimony reaches the point at which Detective Stark was present that we be so advised?

Mr. Cahn: I will be glad to do that.

Mr. Goodman: Thank you.

The Witness: Phillips stated that he had had something to eat at the Hempstead bus terminal. He told me he had gone to the New York State Employment office. He also said he had purchased a record, I believe in Grant's.

250 *Norman Rofheart—for People—Cross*

He had further stated that he went to see some people at South Franklin Street and that he had visited some other people in Hempstead Heights.

He further stated he filled out an application in Mineola for a job, and that he returned to his room about 7 o'clock that evening or 7:30.

I then took a statement from Phillips in reference to these activities and I typed it up and he read it over, initialing the mistakes,
251 and signed it in my presence.

By Mr. Cahn:

Q. About what time was this statement taken, sir? A. The statement was started at approximately 2:30 and finished at about 3 P. M.

Q. I show you this and ask you if that is the statement which you took and is that the defendant's signature? A. Yes, sir, it is.

By Mr. Goodman:

252

Q. Detective, when you first took Phillips into custody and over to your headquarters, were there any other officers with you? A. Yes, sir, there were.

Q. How many? A. One other officer when we arrived at the station house that was with me in the car.

Q. I didn't hear. A. I say there was one other officer in the car with me.

Q. Didn't that officer actually go with you into the house where you found Phillips? A. Yes, sir, he did.

Q. Wasn't he with you when you took Phillips into custody? A. Yes, sir, that's correct.

Q. Did you advise Phillips that he was under arrest? A. No, sir, he was not under arrest.

Q. Did you advise him that he was not obliged to go with you since he was not under arrest? A. I asked him if he would come to the station house with us and he did.

Q. I now ask you, Detective, if you told him that he was not obliged to go with you since he was not under arrest. A. No, sir, I did not.

254

Q. And you and this other officer then rode in an automobile with Phillips to headquarters, is that correct, or at least to the precinct, is that correct? A. That's correct. I want to straighten you out on one point. There was one other officer with me at the time we were in the car going to the station house. There were other officers at the station house.

Q. So that there were three officers in the automobile that took Phillips? A. No, sir; two officers, myself and one other in the automobile.

Q. Yes? A. And then—

255

Q. When you arrived at the precinct— A. There was still just the two of us.

Q. Did the two of you together interrogate Phillips? A. No, sir.

Q. Just yourself? A. Yes, sir.

Q. And this interrogation continued from about 1:30, was it, until 3 when it was typed and signed? A. From about 1:30 to 2:30 at which time I started to type.

Mr. Goodman: No objection.

(Paper referred to received and marked Plaintiff's Exhibit 14 in evidence.)

Mr. Cahn: With the Court's permission—

(Mr. Cahn thereupon read People's Exhibit 14 to the jury.)

By Mr. Cahn:

Q. At any time, Det. Rofheart, until that statement was completed, did Willard Phillips tell you that he was anywhere near Cruikshank Avenue or Our Lady of Loretto School that day? A.
257 No, sir, he did not.

Q. Did he at any time tell you he had seen Sunday Graham that day? A. No, sir, he said he had not.

Mr. Cahn: Det. Stark, do you want to step out for a while?

(At this point Det. Stark leaves the courtroom.)

Q. Now, you told us, Det. Rofheart, that you finished this statement about 3 o'clock? A. That's
258 correct.

Q. Now what, if anything, thereafter happened? A. After I finished this statement I talked to Phillips a little further. At about 4 o'clock we were notified by the Garden City Police Department that the body of a young colored girl had been found on Commercial Avenue. After learning this, I spoke to Phillips again, questioned him about Sunday Graham and her whereabouts, if he had seen her.

Q. How long, thereafter, did you question, sir? A. Well, not continually but on and off.

Q. Until about what time? A. Until about 6:30.

Q. What took place at that time, if anything? A. At about 6:30 Det. Stark was present at the Third Precinct.

Q. Det. Stark is connected with what bureau of the Nassau County Police Department? A. Homicide Squad.

Q. You are connected with the Homicide Squad? A. No, sir.

Q. What is your connection? A. I am in the Third Squad.

Q. As I understand it, sir, you got word of the 260
body at about 4 P. M.? A. That's correct.

Q. At which time you questioned the defendant Phillips on and off until about 6:30? A. Yes, sir.

Q. Then you say Det. Stark came in? A. Yes, sir. Det. Stark came in and I spoke to him in reference to Willard Phillips. I showed him that statement. We discussed the case between us, and then Det. Stark went in to talk to Phillips and explained to him that certain tests were going to be done. He asked him—it was around 6:30 or 7 o'clock and he asked him if he wanted something to eat at this time before these tests were 261
performed and he said no; and then Dr. Lukash and Inspector Pribyl came in and took a solution and Phillips consented to have his penis washed. His clothes were taken and he was given other clothes, and then Det. Stark talked to Phillips again.

Q. About how long and until about what time was this when Dr. Lukash and Inspector Pribyl came in? A. They came in shortly after Det. Stark.

Q. About how long? A. Five, ten minutes after he did.

Q. How long did this take place, until about what time? A. From about a quarter to 7 to approximately 8 o'clock.

Q. Then you say Det. Stark came in and spoke to the defendant Phillips? A. Yes, sir, for a short time.

Q. What did he say to him at that time? A. He questioned him along the same lines as I did and Phillips gave the same answers as he did in that statement.

Q. Yes? And at that time what happened? A.
263 Det. Stark—it was about 8 o'clock then—and shortly after Det. Stark went out for supper and it was at that time he also asked Phillips if he wanted something to eat, he would bring it back with him, and Phillips refused.

Q. Who remained with Phillips when Det. Stark left at about 8 o'clock as you say? A. I was with Phillips all the time.

Q. Did you question him at that time? A. No, sir. I was doing some other work. I may have spoken to him, but he was sitting on a chair next to the wall.

264 Q. Now, what happened thereafter? A. At about 9 o'clock or shortly after 9 Capt. Closs was present. He spoke with the defendant, questioned him.

Q. How long did he talk to the defendant? A. I would say 45 minutes to an hour.

Q. That would bring us to about a quarter to 10 or 10 o'clock? A. Yes, sir, about 10 o'clock.

Q. What happened after that? A. Det. Stark came back and Det. Stark came in to where Phillips was and he spoke with him, questioned him with reference to his activities the previous day.

The answers that he had given to me earlier were again the same answers he gave.

Q. Did you question him at any time after Capt. Closs questioned him? A. Yes, sir, I had a few words along the same lines of his activities. There were some discrepancies.

Q. Did there come a time when Mrs. Graham spoke to the defendant? A. Yes, sir. Mrs. Graham came into the Third Squad at about 10:30.

Q. Did you see Mrs. Graham come into the squad? A. No, sir. I was in the other room with Phillips. Det. Stark was talking with Mrs. Graham in another room. 266

Mr. Cahn: I offer it in evidence.

Q. Now, did there come a time when Mrs. Graham was brought into Mr. Phillips or Mr. Phillips was brought in to Mrs. Graham or vice-versa? A. Yes, sir, at about 10:30 or so Phillips was taken out. I brought him into the other room where Mrs. Graham was and they were allowed to speak alone.

Q. How long did they talk together? A. They spoke together for about fifteen, twenty minutes. 267

Q. Thereafter what happened, if anything, sir? A. Phillips was taken back into the other room and Mrs. Graham left, and shortly thereafter Mrs. Graham's brother came in and spoke to Phillips and then—

Q. How long did he talk to him? A. About a half hour.

Q. Were you in there when— A. No, sir, he was alone with him.

Q. Then what happened? A. Mrs. Graham's brother left and Phillips was brought back into

the other room and I spoke to Phillips again in there and at about—oh, 1 o'clock or 1:30 I had left the room and shortly after Phillips was taken to headquarters.

Q. Did you go to headquarters with Phillips? A. No, sir, I did not.

Q. When you say headquarters, do you mean headquarters over in Mineola? A. Nassau County Police Headquarters, that's right.

Q. In all the time that you were with Phillips, Det. Rofheart, did he ever tell you that he had
269 seen Sunday Graham on May 12, 1958? A. No, sir, he never did.

Q. In all the time that you were with the defendant Willard Phillips did he tell you that he was anywhere near Cruikshank Avenue or Our Lady of Loretto School on May 12, 1958? A. No, sir, he didn't.

Mr. Cahn: That's all.

Cross-examination by Mr. Goodman:

270 Q. At any time that you had Phillips under your control or custody was Lieutenant Cummings present? A. Well, Lieutenant Cummings had been present in and out of the room as well as other officers.

Q. But did he or was he present at the time that you were questioning Phillips? A. No, sir, he was not.

Q. Never heard you ask Phillips a question? A. I don't believe so, no, sir.

Q. Do you know of your own knowledge whether or not he asked Phillips any questions? A. He may have.

Mr. Goodman: I think it only fair that the record indicate that we had had a representation from the District Attorney that Lieutenant Cummings was not going to take the witness stand here.

Mr. Cahn: I still say that, sir. I have no intention of calling Lieutenant Cummings.

The Court: All right. Next question.

Q. On what street is the precinct headquarters to which you took Phillips? A. From his home?

Q. No. It is in Mineola, is it not? A. I didn't take him to headquarters. 272

Q. To your precinct, sir. A. My precinct, the third precinct?

Q. Yes, where is that? A. On Hillside Avenue, Williston Park.

Q. In terms of miles, how far is it from this courthouse? A. About one mile.

Q. Which branch of our county government has the obligation and the duty to investigate and enforce the breach of the criminal law?

Mr. Cahn: Objection. 273

The Court: Sustained.

Q. Do you know the answer to that question?

Mr. Cahn: Objection.

The Court: Sustained.

Q. Detective, is it not true that when a crime of any consequence is committed in this county that it is the District Attorney whose duty it is with the aid of the police department to investigate that crime?

Mr. Cahn: Objection.

The Court: I will permit it.

Mr. Cahn: Just a moment, your Honor.

The Court: He is asking him a question if he knows if it is true. He can answer it.

Mr. Cahn: It certainly takes into consideration something that is not true.

The Court: If he knows he is going to answer. If he doesn't know, he is going to say he doesn't know. Overruled.

275 A. Would you repeat the question.

(Last question read by stenographer.)

A. I believe that is so, yes, sir.

Q. Isn't it the practice of the Police Department of this county to advise the District Attorney that a crime of consequence has been committed and to be guided by his direction in the manner in which you investigate it? A. These decisions aren't up to me, sir.

Q. To whom are these decisions? A. My

276 superiors.

Q. Do you know whether or not in turn the District Attorney of this county is the superior of your superiors? A. I don't know.

Q. Did you from the moment that you took Phillips into custody until the time he was taken from you, advise the District Attorney of the fact that you had him in custody?

Mr. Cahn: Objection as to form, assuming a state of facts that has not been shown into evidence.

The Court: You mean the point from where he was taken into custody?

Mr. Cahn: Nobody has testified as to that point.

The Court: Sustained.

Mr. Goodman: I will withdraw it. The District Attorney's point is well made.

Q. From the time you had Phillips with you at his home and continuing at the time to the precinct and until such time he left you, and went with someone else ,did you notify the District Attorney of that fact that he was with you? A. No, sir, I did not. 278

Q. Do you know whether any member of your department notified the District Attorney of that fact? A. I don't know, no, sir.

Q. When was it that you learned, Detective, of the fact that the child's body had been found? A. At about 4 P. M. on May 13.

Q. At that time you were with the defendant over in Williston Park about a mile from this courthouse, is that right? A. Yes, sir, that's correct. 279

Q. Do you know that on that day and at that time there were Judges sitting in the District Court of the County of Nassau in the building across the parking lot? A. I don't know that, sir, no.

Q. Do you know, based upon your experience as a police officer, that there are Judges who sit there each day as presiding Magistrates? A. Yes, sir, but if they are there at 4 o'clock, I don't know. If they were there on that day at 4 o'clock, I don't know.

280 *Norman Rofheart—for People—Cross*

Q. Did you try to find out if there was a Judge in the District Court here in Mineola a mile from where you were at 4 o'clock that afternoon? A. No, sir, I did not.

Q. You didn't make the attempt, did you, Detective? A. No, sir.

Q. Are you familiar with the provisions of the Code of Criminal Procedure of the state? A. Some of them, yes.

Q. Are you familiar particularly with Section
281 165 of the Code of Criminal Procedure which in effect provides that unnecessary delay in the arraignment of a defendant is forbidden by law? A. Yes, sir.

Q. Detective, tell the members of the jury what is meant by an arraignment of a defendant.

Mr. Cahn: Objection.

Mr. Goodman: I thing that the jury is entitled to know, if your Honor please.

The Court: Sustained at this time. I have no proof of an arrest yet.

Mr. Goodman: Well, in any event, may I
282 have it on a point of cross-examination?

The Court: It is immaterial at this time, Mr. Goodman. It is irrelevant right now.

Mr. Goodman: I submit, if your Honor please, that this detective has testified that he had the man in his custody, whether he had placed him under formal arrest or not, he was in his custody and his control. The detective now has knowledge that a murder has been committed. I want to know whether or not he arraigned his suspect.

The Court: Objection sustained.

Mr. Goodman: I respectfully except.

The Court: All right.

Q. When was it that you placed Phillips under arrest, if you ever did? A. I never did, sir.

Q. At any time did you tell him while he was with you that he was free to go because he was not under arrest? A. No, sir, I did not.

Q. Did you tell him he had to remain with you for questioning? A. Earlier I did, yes, sir.

Q. You stated to him that he had to remain with you because he was under questioning and a suspect; is that correct? A. Well, let me say that when he was brought to the Third Precinct he came on his own. We told him to come along 284 and he agreed. He spoke with us and I interviewed him up until 4 o'clock when the body was found, and then I think he would have a little difficulty in going away on his own.

Q. Let's go back to before that for just a moment if you don't mind, Detective. You took him with you at about 1:15, is that correct? A. Yes, sir.

Q. And you took him over to your precinct, is that correct? A. Yes, sir.

Q. Never advised him that he was under arrest, is that correct? A. Yes, sir. 285

Q. Never told him that he had no obligation to remain with you, is that correct? A. Yes, sir.

Q. And you questioned him, is that correct? A. Yes, sir.

Q. Did you ever tell him while you were questioning him that he was under no duty to answer your questions? A. No, sir .

Q. Did you ever tell him that anything he might state to you in response to your questions could be held against him?

286 *Norman Rofheart—for People—Cross*

Mr. Cahn: Now, this I object to as irrelevant and immaterial. We are not on a television show. We are in the State of New York where that is not the law.

The Court: The question is did he tell him that. It is a proper question. I will go along with you it is not the law that requires him to tell him that.

Next question.

Mr. Goodman: If your Honor please, the District Attorney and your Honor have both
287 made a statement and I must, for the record, respectfully except and take issue with you both. I submit that under the authority of People against Leyra—and I will give you the citation in a moment—this is an element which the Court may consider in determining whether or not the confession was freely and voluntarily given.

The Court: We don't have it in issue yet, counselor.

Mr. Cahn: I don't know what confession he is talking about with Det. Rofheart.

288 The Court: We don't have that matter in issue yet. When we get around to it I will so admonish the jury.

Mr. Goodman: If your Honor please, would I then at that time be obliged to call this man back on the witness stand to ask him the question?

The Court: Right now I don't see any relevancy other than the question you have asked him and at that time I say there was no legal right to have to tell him that. He came there voluntarily and questioned him according to his testimony.

Mr. Goodman: Will your Honor accept the question and the answer subject to connection by the defense?

Mr. Cahn: Connection with what?

The Court: In connection with the evidence that we have so far?

Mr. Goodman: No, in connection with the attack on the confession which is inevitable in this trial.

Mr. Cahn: I will withdraw my objection, sir.

Mr. Goodman: Thank you, Mr. Cahn. 290

The Court: Let me have that question again. Let me hear it again.

(Last question read by stenographer.)

A. No, sir, I did not.

Q. And without giving him any of these warnings you persuaded him in some fashion to give you the statement that is in evidence, is that right?

Mr. Cahn: I object to the form of the question. 291

The Court: Sustained.

Q. In any event, he did at some time give you this signed statement which is now in evidence and marked People's Exhibit 14, is that correct? A. Yes, sir, it is.

Q. Now, in People's Exhibit 14 he certainly doesn't state that he committed a crime, isn't that true? A. That is correct.

Q. If this were accepted as the only evidence in the case, he would certainly be absolved from the commission of a crime; is that right?

292 *Norman Rofheart—for People—Cross*

Mr. Cahn: Objection. Let us not go into the field of speculation.

The Court: I will permit the question. Answer it.

A. Yes, sir, probably so.

Q. What time did he sign this statement? A. At about 3 P. M. on May 13.

Q. But you continued to hold the man in headquarters after he had signed this statement, is that right?

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Mr. Cahn: Objection to the form of the question.

The Court: You object to the word "hold"; is that what you object to?

Mr. Cahn: Yes.

The Court: I will permit it. Answer the question.

A. He was kept at the Third Precinct at the time, yes, sir.

Q. He was kept, wasn't he, sir? A. Yes.

294 Q. After he signed this statement which is in evidence. A. That's correct. He never asked to leave.

Q. I am sorry? A. I say he never asked to leave.

Q. But he was kept, is that correct? A. He didn't ask to leave.

Q. Yes or no, Detective, was he kept after he signed that statement? A. Yes, sir, he remained there.

Mr. Goodman: May I respectfully ask or request that the witness be admonished to

give me a responsive answer and not to volunteer.

Q. I want a yes or no. Was he kept after he had signed that statement, yes or no? A. Yes, sir.

Q. Was he at that time told that he had no duty to remain? A. Yes, sir.

Q. He was told that he had no duty to remain? A. I am sorry; no, sir, he was not told.

Q. Now, Det. Rofheart, according to what the defendant told you he had been awake since 6:15 296
in the morning of that day, is that right? A. Yes, sir.

Q. Did he tell you what, if any meals he had had before you got to him that day? A. I believe it is right in the statement there.

Q. What is your recollection as to what he said? A. He said—I am sorry, that was the previous day. On that day, on the 13th?

Q. That's right. A. No, there was no mention of anything he had to eat that morning, no, sir.

Q. Do you now have a recollection as to whether 297
or not any indication had been given to you as to whether he had eaten that day before you got to him? A. Before 11 or 12 noontime?

Q. Before you got to him which was about 11, wasn't it? A. That's correct. No, sir, I don't remember.

Q. So as far as you knew he may not have eaten before you got to him on that day, is that right? A. That's correct.

Q. And he was with you, was he not, from 11 at his home and continuing at headquarters until

1:30 the following morning, is that right? A. The morning of the 14th, that is correct.

Q. And during that entire period he was under your close scrutiny, was he not? A. Yes, sir, he was.

Q. During that entire period of time while under your close scrutiny, Detective, did he have a single thing to eat? A. No, sir, he didn't.

Q. At any time up until 1:30 in the morning when he left your custody or went away from
299 you did he tell you that he was sleepy? A. Yes, sir.

Q. He said he was sleepy? A. Yes, sir, he did.

Q. Was he permitted to lie down and go to sleep? A. He didn't lie down. He dozed in a chair.

Q. Detective, isn't it the fact that with the exception of the time when he spoke about 10:30 with Mrs. Graham and later with her brother that all of the rest of the time from time to time you got him over to the precinct until 1:30 when he left you he was being constantly questioned?
300 A. No, sir, that is not so.

Q. Is it your testimony that he was merely permitted to sit in a chair and nobody spoke to him? A. I didn't say that.

Q. Well, tell us what happened? A. I spoke to him myself. I questioned him when we first came into the station house. I spoke with him from about 1:30 until about 2:30 at which time I took the statement. That took about a half an hour or so.

Around 3 o'clock he was left alone as far as being questioned. He wasn't constantly questioned as you stated. He was talked to from time

to time. Men had gone out to investigate and verify the statement that he had made.

Q. Incidentally—

Mr. Cahn: Let him finish.

Q. Go ahead, continue; I am sorry. A. During these investigations on the outside in reference to the remarks that he had made, he was not questioned. He was sitting in the chair there. He was not questioned again until Det. Stark came in. We spoke. I spoke to him myself and Det. Stark 302
spoke to him for a few minutes. It was at that time that he was offered something to eat which he did not want.

Q. What time was that, Detective? A. At about 6:30.

Q. Can you recall in all how many different officers spoke to him up until 6:30? A. Well, myself, I spoke with him. Lt. Curran, my immediate superior, spoke to him.

Q. Who? A. Lt. Curran.

Q. C-u-r-r-a-n? A. Yes.

Q. Who else? A. Capt. Closs. 303

Q. How do you spell that? A. C-l-o-s-s.

Mr. Cahn: Is this up to 6:30?

Mr. Goodman: Yes, sir, that's right.

Mr. Cahn: 6:30 when Det. Stark came in?

Mr. Goodman: That's right.

The Court: We will have a ten-minute recess. Don't discuss this case among yourselves until the case is finally submitted to you.

(A recess was thereupon taken.)

304 *Norman Rofheart—for People—Cross*

(After recess.)

NORMAN ROFHEART, a witness previously called on behalf of the People, having been duly sworn, resumed the stand and testified further as follows:

Cross-examination (continued) by Mr. Goodman:

Q. Detective, my recollection is that you were telling us that one of the officers who questioned the defendant was Captain— A. Closs.

305 Q. How do you spell the name, please? A. C-l-o-s-s.

Q. Were there any other officers who questioned or spoke with Phillips during that period of time?

Mr. Cahn: That is just the point I raised before. I think it should be clarified that Mr. Goodman now refers to the time up until 6:30, were there any officers who questioned the defendant Willard Phillips.

Mr. Goodman: That is correct. I am limit-

306 ing myself to that period of time.

Mr. Cahn: Up until that time.

A. Well, that is not—I questioned Phillips—you are talking now from the time he was brought into the station house up until 6?

Q. That's right. A. It was myself who had questioned him at one time and Detective Diggs had questioned him at one time.

Q. May I interrupt for a moment. Did Detective Diggs interrogate the defendant in your presence? A. Yes, sir, he spoke to him. I left the room for a few minutes but I came back in.

Q. But was there a period or periods of time during which Phillips was questioned when you were not there? A. Maybe a minute or so.

Q. And on only one occasion while Diggs was talking to him?

A. Diggs only spoke with him for possibly fifteen or twenty minutes.

Q. And you were present all of that period of time with the exception of just one minute when you were out of the room, is that correct? A. I may have left twice.

Q. Who else? A. A Lieutenant Curran, I think I mentioned him, and Sergeant Owens. I believe they were the only ones.

Q. Who was the officer in charge of the precinct 308
at that time? A. The precinct?

Q. That was actually physically present and then in charge. A. Of the squad, are you talking about?

Q. Well, Detective, I assume that at all times someone in the precinct is in charge aside from the captain or the inspector.

Mr. Cahn: If I may explain to Mr. Goodman, there is a different command between precinct and squad. There is a different command between the third precinct and the third 309
squad. Although they are in the same building, it comes under a different heading.

Q. Did you have a superior present at these headquarters while you were interrogating Phillips? A. In the same room? No, sir.

Q. In the same building. A. Yes, sir.

Q. Was that Captain Lada? A. Captain Lada was present but not at that time.

Q. When did Captain Lada come into the precinct? A. He came in I would say about from 9 o'clock to 10 o'clock.

310 Q. Were there any other officers that spoke to Phillips up until 6? A. No, sir, I believe I have named them all.

Q. In how many different rooms was Phillips interrogated during this period up until 6 o'clock? A. Well, we have four rooms in the squad. The squad is assigned to four rooms in the building which we use. To the best of my knowledge he was in three of them at different times.

Q. In other words, on different occasions he would be taken from one room and brought into
311 another for whatever the reason might be, is that right? A. That is correct.

Q. Shuttled about in three different rooms?

Mr. Cahn: Objection.

The Court: I will take it.

Mr. Cahn: I object to the form of the question.

The Court: Do you mean shuffled?

Mr. Cahn: Shuttled was the word and I object to the use of it.

The Court: I will take it for whatever it is
312 worth. Answer the question.

A. The defendant was taken from one room to the other, yes, sir.

Q. And there came a time, did there not, when Lieutenant Stark or Detective Stark came into the picture? Is that right? A. That is correct.

Q. What was his rank at the time? A. He is a detective.

Q. Detective? A. Yes, sir.

Q. And did he take over as far as the investigation was concerned, or did he work in collaboration with you? A. Both of us worked together on it, yes, sir. Detective Stark was not called in until we had a homicide. He is in the homicide squad.

Q. What time did he arrive? A. Approximately 6:30.

Q. And did he immediately commence questioning Phillips? A. No, sir, he spoke with me first.

Q. For how long a period? A. Twenty minutes to a half an hour. Possibly a little longer.

Q. Then it was about 6:30 that he started to speak with Phillips, is that right? A. No, sir, he came into the building about practically 6:30 and spoke with me for a while until possibly 7 or 7:15. He read the statement that I had from Phillips and we discussed certain matters in reference to 314 the statement.

Q. So while you were talking with Detective Stark were any other officers talking to Phillips? A. I believe—this was around 6:30. I have previously mentioned that Inspector Pribyl and Dr. Lukash were inside talking to Phillips.

Q. Now, they didn't get there until 8, Detective. A. No, sir, they got there approximately 6:45 or 7 o'clock. Very shortly after Detective Stark came. About 6:45.

Q. Did you hear Phillips voluntarily submit to this test that they made? A. Yes, sir. 315

Q. I am speaking of Inspector Pribyl and the doctor. A. Yes, sir, I did.

Q. What time approximately was it that Detective Stark commenced interrogating the defendant? A. At about 7:30.

Q. Were you present at all the times that the detective was questioning him? A. Yes, sir, I was.

Q. Were there any other officers present while Detective Stark was questioning him? A. Well, if I can explain to you, we have a number of men in our squad who were working on other cases and

they also use the room. There is typewriters in there, they have supplies in the room. They continually walk in and out. There were numerous men working that night, but—

Q. Let us confine ourselves, Detective, to those men working on the Phillips case. A. Well, there were men out in the field checking his—what he had told us in the statement.

Q. But what about the men that interrogated him in the precinct until such time as he was taken
317 to Headquarters? A. I believe I have mentioned them.

Q. Just yourself and Stark from about 7 or 7:30 until 1:30 in the morning?

Mr. Cahn: That was not testified to.

Mr. Goodman: Well, I am trying to find out what is the fact.

The Witness: You are talking about up until 6 o'clock?

Q. No, now we have gotten to a point where it is 7 and Detective Stark has come in from the
318 homicide squad and he is interrogating. Let us go forward from that point. A. Well, Detective Stark, as I previously mentioned, went out to eat at around 8 o'clock. He only spoke to Phillips for a short time before this going to dinner. And he came back about 9 o'clock and Captain Closs was talking to the defendant at this time, at 9 o'clock.

Q. Did you go out to dinner at any time? A. No, sir, I did not.

Q. Remained with Phillips until he left at 1:30? A. Yes, sir.

Q. At any time while Phillips was with you did you ever say to him in words or substance, "You

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better tell the truth, Brother, because you are in trouble and we will fix you good"? A. No, sir, not that.

Q. Did you ever tell him that things could go very rough with him if he didn't come up with the truth, in words or substance? A. No, sir.

Q. Did you ever indicate to him that you were his friend and that if he cooperated you would see that things would go as lightly with him as possible? A. No, sir, I just asked him to tell the truth.

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Q. Never indicated that you were his friend and you wanted to work with him? A. No, sir.

Q. Up until 1:30 the following morning, Detective Rofheart, how many times did Phillips ask you to use the telephone and call a lawyer? A. None. He never asked me.

Q. How many times did he ask you to use the telephone to call a friend? A. He never asked to use the telephone.

Q. When was it that Captain Lada first saw Phillips? A. To the best of my knowledge it was about 10 o'clock that evening.

321

Q. Was that after Phillips had already seen Mrs. Graham and her brother? A. I believe it was.

Q. Were you present while Captain Lada spoke with Phillips? A. Yes, sir.

Q. Remained with him all the time that the captain was with him? A. Yes, sir.

Q. At no time was the defendant alone with the captain? A. Not at the third precinct, no, sir.

Q. Did you ever see Captain Lada strike him? A. No, sir.

322 *Norman Rofheart—for People—Cross*

Q. Did you ever hear Captain Lada say to him, "You black bastard, talk or it will go rough with you"? A. No, sir.

Q. Does the Police Department have available to it stenographers? A. Do you mean in the Police Department?

Mr. Cahn: I don't understand. May I have that question read, please?

(Question read by the Reporter.)

Mr. Cahn: I don't understand the question.

323 The Court: It is a question if he understands it, Mr. Cahn.

Q. Do you understand my question, Detective? A. I'm afraid not, sir.

Q. Do you know whether or not there came a time later that Phillips signed a confession? A. Well, I left at 1:30.

Q. So you have no positive knowledge of that part, is that correct? A. Not that night, no, sir.

Q. In your entire police experience, Detective, have you ever seen a defendant confess while a

324 man like the gentleman in front of you wrote down in shorthand what he was saying? A. Not in my experience, no, sir. Not in my time on the police force.

Q. Then you don't know that that has ever been done to your personal knowledge, is that right? A. Not to my personal knowledge, no, sir.

Q. Does the Nassau County Police Department to your knowledge have and use tape recording or wire recording devices? A. Not to my knowledge, no, sir.

Q. Have you ever personally known the Department to get a court order permitting it to

tap a wire? I am speaking of the Police Department? A. I believe they have in the past. 325

Q. Or to record or bug a room? A. I don't know.

Mr. Cahn: I object to that.

The Court: Sustained, to your last question.

Q. Officer, or Detective, did you cause what was said by Phillips and by yourself and the other officers during the entire period of your interrogation to be recorded either in shorthand or on some mechanical recording device? A. No, sir, never. 326

Q. So that there is nowhere for our scrutiny a record of the words that you uttered to him or the other officers uttered to him and his responses, is there? A. Nothing that I said to him to my knowledge has been recorded.

Q. From the time that Phillips came under your control or was with you at 11 in the morning until he left you at 1:30 did he have anything to eat? A. He had been offered food and refused it. 327

Q. I didn't ask you that, Detective. Did he have anything to eat, yes or no? A. No.

Q. Did you ever observe him while he was with you and up until 1:30 start to doze off in his chair and either you or someone shook him and woke him up? A. No, sir, that is not so.

Q. It never happened. A. Never.

Q. Did you ever say to him or did any of the other officers in your presence say in words or substance, "Phillips, if we don't get it out of you one way we will get it out of you another?" A. No, sir, never heard it.

Q. Never saw anyone lay a hand on him, is that your testimony? A. Yes, sir, definitely not.

Q. Never heard anyone utter a curse word towards him, is that right? A. Not in my presence, no, sir.

Q. Nor use a threatening manner or threatening tone? A. Not in my presence, no sir.

Mr. Goodman: No further questions.

Redirect examination by Mr. Cahn:

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Q. Now, Detective Rofheart, I believe you testified on cross examination that after four o'clock the defendant would have found it difficult to leave. I believe that's the way you put it, is that correct? A. Yes, sir.

Q. Well, may I ask you, sir, up until 4 p.m. did you have any idea that a crime had been committed? A. No, sir, we only had a missing person alarm up until 4 P. M. on May 13th.

Q. And during that period of time if Phillips had asked to leave would you have to let him go?

330 A. Yes, sir.

Mr. Goodman: If your Honor please, I say that calls for the operation of the witness' mind and I respectfully object.

The Court: I am going to permit it. You opened the door by your questioning, Mr. Goodman.

Mr. Goodman: I most respectfully except, if your Honor please.

The Court: All right.

The Witness: Yes, sir, he could have left if he asked.

Q. After 4 o'clock would you have let him go if he had asked to leave? A. No, sir, not after 4 o'clock.

Q. Would you have placed him under arrest at that time if he had asked to go? A. Yes, sir.

Q. And I believe you told us that you never placed him under arrest? A. No, sir, I did not.

Q. I believe you testified on both direct and cross examination that about 4 o'clock you learned from the Garden City Police Department that a colored girl's body was found? A. That is correct.

332

Q. Did you know at 4 o'clock that it was Sunday Graham? A. No, sir, I did not.

Q. Did you know at 4 o'clock that the body had been murdered? A. No, sir, I did not.

Q. When was the first time you learned that it was actually Sunday Graham who was found? A. At about 5 P. M.

Q. That was the first time that you knew it was Sunday Graham? A. Yes, sir, that is correct.

Q. Up until 4 o'clock did you have any evidence that a crime had been committed by anyone in reference to Sunday Graham? A. A crime had been committed?

333

Q. By anyone in reference to Sunday Graham, up until 4 o'clock? A. Until 4 o'clock? No, sir.

Q. And at 4 o'clock up until 5 o'clock did you know that it was Sunday Graham who was found dead? A. Not until 5 P. M.

Q. Now, you told us on cross examination that after 4 o'clock you questioned Phillips some more. A. Yes, sir, that's right.

Q. On and off? A. Yes, sir.

Q. And other people, Detective Diggs, questioned him for about fifteen minutes? A. Yes, sir.

Q. And Lieutenant Curran? A. Yes, sir.

Q. And Sergeant Owens? A. Yes, sir.

Q. And that went on until about 6 or 6:30? A. That is correct.

Q. Was the questioning between 4 and 6:30 a constant questioning? A. No, sir.

Q. By the way, had you been to sleep the night before? A. No, sir.

Q. You started on this case at 10:15, I believe you stated, the previous night? A. That is correct.

Q. Were you tired? A. Very tired.

335 Q. Now, you were asked did the defendant, Willard Phillips, have anything to eat, is that correct? A. That's right.

Q. And did he have anything to eat? A. No, sir, he did not.

Q. Was he asked if he wanted something to eat? A. He was. He was asked twice in my presence. He didn't want anything.

Q. Now, does the Police Department have any stenographers employed to take statements, the Police Department itself? A. No, sir, they don't.

Q. And when a statement is taken by a police
336 officer it is taken in narrative form, then? A. Yes, sir, it is.

Q. Such as this statement marked People's Exhibit 14? A. Yes, sir. The detective takes his own statements.

Q. Now, another thing: you were asked if the Police Department has wire recorders and tape recording machines, and you said no. Did you mean that, Detective Rofheart? A. Well, I believe they have some but there was nothing present that evening.

Q. Did you in all your experience on the Police Department ever have a statement of a defendant taken by a recorder? A. No, sir, never.

Q. And did you in all your experience in the Police Department have a police officer take a statement by a stenographer employed by the Police Department? A. No, sir.

Q. Now, you also told us, I believe, that Phillips left about 1:30 from the third precinct—1:30 A. M.—and was brought over to Mineola Headquarters. A. Well, I left at 1:30. I don't know what time—he left later, I should say. I left about 338
1:30.

Q. You left about 1:30? A. Yes, sir.

Q. Well, then, do you know what time— A. That evening I—

Q. That Phillips, the defendant, was brought over to Mineola? A. Well, as I say, I left that morning at 1:30.

Q. Yes. Was Phillips still in the third precinct? A. Phillips was still in the third precinct at that time.

Mr. Cahn: That's all. 339

Recross examination by Mr. Goodman:

Q. Detective, at about 5 o'clock that afternoon you knew that a dead Negro child's body had been found, did you not? A. Yes, sir, I knew it about 4.

Q. But at 5 you knew it and you also knew that that body was the body of Sunday Graham, did you not? A. That is correct.

Q. And did you also know at 5 o'clock that the boidy was in such condition that it was apparent

that the child had been murdered? A. Yes, sir, I did.

Q. So that at 5 o'clock you had personal knowledge of the fact that Sunday Graham had been murdered and her body had been found isn't that so? A. Yes, sir.

Q. And at that time you had no admission from Phillips that he was guilty of that crime, isn't that correct? A. That is correct.

Q. But you knew at 5 o'clock a crime had been committed? A. At 5 o'clock, yes, sir.

341 Q. And at that time you had reason to believe, or you suspected Phillips of having committed the crime, did you not? A. Yes, sir, I did.

Q. As a matter of fact, if he had asked to be released you would have immediately told him he was under arrest, isn't that right? A. At 5 o'clock, yes, sir.

Q. Is that correct? A. That is correct.

Q. Now, at that time to your knowledge that crime had been committed and with the belief that Phillips had committed it and with the courthouse one mile away, did you check to determine if there

342 was a magistrate available for an arraignment? A. At that time? No, sir, not at 5.

Q. You didn't try, did you, Detective? A. No, sir.

Q. Were you still in charge of this investigation at that time? A. Yes, sir.

Q. Isn't it true, Detective Rofheart, that the reason that you did not determine whether or not there was a magistrate available for arraignment was that you wanted to retain Phillips in custody so that you could get a confession from him which would tie him to the crime? A. Yes, sure.

Q. That was the reason, wasn't it? A. Well, there was no magistrate.

Q. Just yes or no. Your reason for keeping him was so that you could exact from him a confession of the crime which you knew had been committed? A. Not solely.

Q. Was it one of your reasons? A. One of the reasons, yes, sir.

Q. And with that reason in mind you kept him in custody and you made no attempt to bring him before a magistrate, isn't that correct? A. There was none available. 344

Q. You didn't try to find out, did you, Detective? A. Well, from previous experience I—

Mr. Goodman: I move that the answer be stricken and I now ask this, Detective:

Q. Did you on that day at 5 o'clock, with knowledge that the crime had been committed, with knowledge that Sunday Graham was the victim, with reason to believe that Phillips was the guilty party, did you on that day attempt to find out if there was a magistrate over here in this court 345 one mile away so you could arraign him?

Mr. Cahn: I submit he should answer the question as he sees it.

The Court: Let him answer it.

Q. Just yes or no. A. I can't answer it that way.

The Court: We will let the question stand. Go ahead and answer it yes or no.

The Witness: No. No, sir.

346 Q. And then I ask you, sir, is it not true that the reason you did not try to find out if there was a magistrate available was so that you could keep the man in your custody and exact from him a confession of this crime? A. One of the reasons, yes, sir.

Mr. Goodman: That's all.

Redirect examination by Mr. Cahn:

347 Q. Detective Rofheart, at 5 o'clock is there a court in Nassau County open? A. No, sir.

Mr. Goodman: Mr. Cahn knows as well as myself, if your Honor please, that many Judges preside in court long after that hour.

The Court: Answer the question if you can.

The Witness: Usually the courts are closed at 5 o'clock.

Mr. Gordon: I would move respectfully that that answer be stricken as not responsive.

348 The Court: Overruled. I will permit it.

Q. And at 5 o'clock you stated to Mr. Goodman that you had a suspicion that the defendant Phillips might have committed this crime. Is that correct? A. Yes, sir, that is correct.

Q. Did you have any proof? A. We had some, sure.

Q. Did you have any proof to arraign him? A. Yes, sir.

Q. Or to arrest him? A. Yes, sir.

Q. And did you arrest him at that time? A. At 5 o'clock.

Q. At 5 o'clock you arrested him? A. No, sir.

Q. Did you know when he was arrested. A. I don't know when he was arrested, no, sir.

Q. Did you arrest him? A. No, sir, I did not.

Q. Now, at 5 o'clock you knew that there was a dead body and it was Sunday Graham? A. That is correct.

Q. And at that time you had been talking to the defendant Willard Phillips? A. That is correct.

Q. And it was asked of you—you didn't have 350
any admission from him, is that correct? A. That is correct.

Q. But you had a suspicion? A. Yes, sir.

Q. That it was he? And I ask you again, did you have sufficient proof for a case? A. Yes, sir, we did.

Q. You had sufficient proof for a case at 5 o'clock, Detective Rofheart? A. Not at 5, no, sir.

Q. Well, that's what I am asking you, sir. A. Not at 5 o'clock, no, sir.

Q. Was he a defendant at that time? A. No, sir, he was not.

Q. Was he arrested at that time? A. No, sir, 351
he was not.

Q. Was there any reason, then, to bring him before a court even if one were open? A. No. sir, not at 5.

Recross examination by Mr. Goodman:

Q. Detective Rofheart, at 5 o'clock you knew about the dead body and you suspected the defendant, did you not? A. Yes, sir.

Q. And you were in charge of this investigation, were you not? A. That is correct.

352 *N. Rofheart—for People—Recross*

Q. Did you then notify the District Attorney of the fact that the crime had been committed and that you had under your control, if not in your custody, a prime suspect. A. I did not.

Mr. Goodman: That's all.

By Mr. Cahn:

Q. Do you know whether or not the District Attorney was notified? A. I do not.

353 Q. You have no knowledge of that? A. No, sir.

Q. And once a homicide is determined who takes over? A. The homicide squad.

The Court: All right, step down.

The Court: We will recess until tomorrow morning at 10:15.

Gentlemen, do not discuss this case amongst yourselves until you finally deliberate in the

354 jury room. Do not read any newspaper accounts or listen to any radio broadcasts during this recess or any other recess.

(The trial was thereupon adjourned until October 2, 1958.)

Mineola, N. Y., October 2, 1958

Before: Hon. Paul J. Widlitz, County Judge,
and a Jury.

(Appearances as before noted.)

(Trial continued.)

(Roll call of Jurors.)

356

Clarence Smalling, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Clarence Smalling.

Q. Where do you live? A. 78 Litchfield Avenue, Babylon.

357

Direct examination by Mr. Cahn:

Q. Mr. Smalling, may I ask you, sir, to keep your voice up so that the last gentleman in the jury box can hear you at all times? What is your occupation, sir? A. Engineer, Long Island Rail Road.

Q. By whom are your employed? A. Beg pardon?

Q. By whom are you employed? A. Long Island Rail Road.

Q. On May 13, 1958 were you in the vicinity of Garden City? A. Yes, sir.

Q. And were you in the vicinity of Commercial Avenue behind the warehouses in Garden City? A. Yes, sir.

Q. At about what time, sir? A. Well, we generally get around there around 9:30 A. M. in the morning.

Q. And how long did you remain there? A. Well, it varies. Sometimes until 6 P. M. at night.

359 Q. Yes, but I am talking specifically now, sir, of May 13, 1958. Do you remember how long you remained there that day? A. Until around 6 o'clock at night.

Q. Now, at about 4 P. M. or thereabouts, Mr. Smalling, on the day of May 13, 1958, did you see anything unusual in the area of Commercial Avenue in Garden City? A. Yes, I did. I saw a body laying there up alongside of an old building.

Q. At about what time was this? A. Around 4 P. M.

Q. What kind of a body? A. What kind?

360 Q. Yes. A. Well, it was dark-complexioned. I don't know whether it was colored—

Q. Man, woman, child or what? A. Well, it was a woman. She had dresses on so I imagine it was a woman.

Q. Pardon? A. She had dresses on.

Q. Mr. Smalling, I show you this picture and ask you if that is a true and exact representation of the scene as you saw it at that time. A. Yes, sir.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: If your Honor please, the defendant does not dispute that the body of

361

Sunday Graham was found on Commercial Avenue in Garden City, Nassau County, New York, at about 4 P. M. on May 13, 1958. I respectfully submit that this photograph is so highly inflammatory that it would be absolutely prejudicial to accept it into evidence and I must respectfully object.

The Court: Objection overruled.

(Photograph received in evidence and marked People's Exhibit 15.)

362

Mr. Goodman: May the record indicate that it has been received over the objection and with the exception of the defense?

By Mr. Cahn:

Q. Now, Mr. Smalling, after you found the body did you have the police called? A. Yes. When I found that the body was there I ran over to some old building which had a door open and went into that building and a man asked me what I wanted and I told him, "Have you got a phone here?" 363
And he said yes. I said, "Well, there is a body laying down alongside of an old building down there, so you better call the police."

Q. And were the police called? A. Beg pardon?

Q. Were the police called. A. Garden City.

Mr. Cahn: You may examine.

Mr. Goodman: No questions.

364 *Amedeo Robert Viglietta—for People—Direct*

AMEDEO ROBERT VIGLIETTA, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Amedeo Robert Viglietta.

Q. Your rank? A. Sergeant, Garden City Police Department.

365 *Direct examination by Mr. Cahn:*

Q. Sergeant, how long have you been a member of the Garden City Police Department? A. Ten years and nine months.

Q. And on May 13, 1958 were you on duty? A. I was.

Q. And at about 4 P. M. did you go to Commercial Avenue in Garden City? A. I did.

Q. And is that in Nassau County? A. That is correct.

Q. And when you got there what did you see,
366 sir? A. I saw the body of a colored girl on the northeast corner of building 4.

Q. I show you People's Exhibit 15 in evidence and ask you if that is a true and exact representation of what you saw when you arrived? A. That is correct.

Q. And after you arrived, sir, did you notify the Nassau County Police Department? A. Yes, sir, I did.

Mr. Cahn: You may examine.

Mr. Goodman: No questions.

Joseph Edward Foehr—for People—Direct 367

JOSEPH EDWARD FOEHR, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Joseph Edward Foehr.

Q. Where do you live? A. 59 Willow Street, Garden City.

Direct examination by Mr. Cahn: 368

Q. Doctor, what is your profession? A. I am a physician.

Q. Doctor, may I ask you to keep your voice up, sir, so that this last gentleman in the box can hear you at all times? A. Yes, sir.

Q. Where did you go to medical school? A. Long Island College of Medicine.

Q. And when did you graduate? A. 1946.

Q. Are you a duly licensed physician of the State of New York. A. I am.

Q. And do you have an office for the practice 369
of medicine? A. Yes, sir.

Q. And where is that located? A. 520 Franklin Avenue, Garden City.

Q. On May 13, 1958, Doctor, were you called by the Police Department to Commercial Avenue in Garden City? A. I was.

Q. And when you got there what did you see? A. This young girl was lying dead behind one of the warehouses there.

Q. I show you People's Exhibit 15 and ask you if that is a fair and accurate representation of what you saw when you arrived. A. Yes, sir.

370 *Frank Graham—for People—Direct*

Q. And, Doctor, did you pronounce death? A. I did.

Mr. Cahn: No further questions.
Mr. Goodman: No questions.

FRANK GRAHAM, called as a witness on behalf of the People, being first duly sworn, testified as follows:

371

By the Clerk:

Q. What is your name? A. Frank Graham.
Q. Where do you live? A. 12 Green Avenue, Hempstead.

Direct examination by Mr. Cahn:

Q. Mr. Graham, are you any relation to Sunday Graham, the deceased? A. Well, I am her uncle.
Q. And are you a brother of Curtis Graham, her father? A. That's right.

372

Q. On May 13, 1958 did you at the Meadowbrook Hospital morgue identify the body of Sunday Graham to a detective? A. I did.
Q. What detective? A. Detective Sullivan from the homicide squad.
Q. I show you People's Exhibit 10 in evidence and ask you if that is Sunday Graham? A. Yes, that's her.

Mr. Cahn: No further questions.
Mr. Goodman: No questions.

John J. Sullivan—for People—Direct 373

JOHN J. SULLIVAN, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your name? A. John J. Sullivan.

Q. Shield number and squad? A. Shield 95, homicide squad.

Didect examination by Mr. Cahn:

374

Q. Detective Sullivan, how long have you been a member of the Nassau County Police Department? A. Twelve years, sir.

Q. And on May 13, 1958 were you present at Commercial Avenue in Garden City? A. Yes, sir.

Q. What did you see when you got there? A. The body of a young girl. Of course, I was concerned in the investigation. I was assisting Detective Stark at the scene.

Q. I show you People's Exhibit 15 and ask you if that is a true and accurate representation of what you saw when you arrived? A. Yes, sir, it is. 375

Q. Did you accompany the body to the Meadowbrook morgue? A. Yes, I did.

Q. And was the body at that time identified to you by Frank Graham? A. Yes, sir.

Q. And did you identify the body to anyone? A. Dr. Lukash, the County Medical Examiner.

Mr. Cahn: No further questions.

Mr. Goodman: No questions.

Mr. Cahn: We will have to call a ten-minute recess. We went through this rather quickly. The other witnesses are all on their way.

The Court: All right, there will be a ten-minute recess. Do not discuss this case among yourselves until you deliberate in the jury room at the end.

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377 (A short recess was thereupon taken.)

(After recess.)

LESLIE LUKASH, called as a witness in behalf of the People, first being duly sworn, testified as follows:

By the Clerk:

378 Q. What is your full name? A. Dr. Leslie Lukash.

Q. Where do you live, sir? A. 10 Warwick Road, Rockville Centre.

Direct examination by Mr. Cahn:

Q. Doctor, what is your profession? A. Physician.

Q. Will you give us something of your medical background. A. I am chief medical examiner of Nassau County. I am consultant pathologist to Meadowbrook Hospital, pathologist in St. Francis

Hospital and pathologist in the Mid-Island Hospital. I have been deputy medical examiner for eight years and certified by the American Board of Pathology.

Q. Dr. Lukash, may I ask you to keep your voice up so that Mr. Gatteau and all the rest of the jurors in the jury box can hear you at all times. A. Yes, sir.

Q. How long have you been chief medical examiner of Nassau County? A. Going on two years.

Q. You said you were deputy medical examiner for how long? A. Approximately eight years. 380

Q. You are, of course, a duly licensed physician of the State of New York. A. Yes, I am.

Q. And your specialty, as I understand it, is pathology? A. Yes, it is.

Q. Now, on May 13, 1958 did you see one Sunday Graham? Yes, I did.

Q. Where for the first time did you see her? A. I saw Sunday Graham behind a warehouse in Garden City adjacent to a railroad trestle.

Q. I show you People's Exhibit 15 and ask you if that is a fair and accurate representation of the scene as you saw it. A. That's right. 381

Q. Now, will you describe the condition of the body when you first saw it. A. Yes. Sunday Graham was lying face up. Her legs were spread apart and her arms were in a flexed position of this sort (indicating).

The body was cold and her rigor mortis was complete. She was fully dressed except for the presence of the undergarments. She had a plastic belt around her neck and she had a cloth stuffed into her mouth which after we removed her to the morgue we determined that this was her underpants.

282 *Leslie Lukash—for People—Direct*

This pair of underpants was stuffed completely into her mouth and only a small portion of this pair of pants extruded from the mouth. I would say almost less than ten per cent of the undergarment was outside of the mouth. The rest of the undergarment was impacted deep into the mouth and extended deep into the throat.

Q. Dr. Lukash, I show you this picture and ask you if that is a true and accurate representation of the cloth in the mouth as you saw it. A. That's right.

283

Mr. Cahn: Offered in evidence.

Mr. Goodman: If your Honor please, I must respectfully make the same objection to this photograph as I made to the earlier one. I don't recall the exact number. I submit that the defense does not dispute that the pants were stuffed into the child's mouth as described by the doctor, the doctor who is an expert and who has already testified. This photograph can serve no purpose except to inflame the jury. I submit it is highly prejudicial and I must most respectfully object.

384

The Court: Objection overruled.

Mr. Goodman: I respectfully except.

(Photograph referred to received in evidence and marked People's Exhibit 16.)

Mr. Goodman: I think, your Honor, the record ought to indicate, if your Honor please, that your Honor has ruled without looking at the photograph.

The Court: In fact, I have checked the law on it in the last half hour and I am

admitting it in evidence. I will give you the page and number of the book if you want it.

By Mr. Cahn:

Q. Now, Dr. Lukash, did you perform an autopsy on the body of Sunday Graham? A. Yes, an autopsy was performed.

Q. Was an identification made for you of the body? A. The body was identified to me at the morgue by Detective Sullivan.

Q. I also sho you People's Exhibit 10 in evi- 386
dence and ask you if that is the girl upon whom you performed the autopsy? A. Yes, it is.

Q. Now, will you tell the Court and jury, if you will, Dr. Lukash, just what you did in reference to the autopsy? A. May I make or explain a few things that were done at the scene?

Q. Yes. A. At the scene—that is in Garden City—the plastic belt was removed for the purpose of fingerprint examination, and at that time was handed over to the police department, and at that time more examination was made of the body after it was turned over and we found the 387
presence of some leaves and we also found the presence of some peanut shells.

Q. Some what? A. Peanut shells.

Q. Where? A. Adherent to the hair of the deceased. That, in essence, was the most salient things, most important things that were done at that time.

We performed an autopsy on Sunday Graham. The autopsy was a complete autopsy which included a complete examination of the external body and examination of the head, the brain, every cavity within the body, and microscopic

study made and toxological examinations were performed on the organs. The mouth was examined and the neck was examined on Sunday Graham.

Q. What did you find in reference to the mouth and neck? A. Well, the pair of pants was completely impacted into the mouth and throat of Sunday Graham distending the structures in the mouth and pharynx.

Q. When you say the pharynx, where is that located? A. I mean the back part of the throat.
389 The pair of pants extended into and compressing the entrance to the airway. In other words, the pair of pants extended to the glottis which lies over the voice box. The pair of pants was removed and was handed over to the police department.

Q. Do you remember who you handed it to? A. As I recall, I think it was to Detective Sullivan or Inspector Pribyl or his associate.

The neck was examined and we found a very superficial bruise of the skin which underlined the area where the plastic belt existed which we removed at the scene. This area of redness was
390 very superficial and was only limited to the surface of the skin. There was no evidence of any hemhorrage in the neck muscles, no hemorrhage in the tissues of the neck, and there was no evidence of any fractures of the voice box or of the hyoid bone or the bone within the neck region.

Q. May I interrupt you at this time, Dr. Lukash, and ask you a question. When you first observed the body of Sunday Graham and saw this belt around her neck, was it tightly around her neck or loosely around her neck. A. The belt was loosely around the neck.

Q. Go ahead. A. The body cavities were opened and the organs showed small hemorrhages which we associate with sudden asphyxiation. These hemorrhages were present in many organs of the abdominal cavity and many organs of the chest cavity.

We then proceeded to examine the perineum or the region between her thighs or the vulva region, and blood was present around the vulva or in the vicinity of the vagina. Blood was also present on the adjacent thighs. The hymen was torn and 392
the outer portion of the vaginal tract was also torn and traumatized.

Q. When you say traumatized, what do you mean? A. I mean lacerated and the tissue broken.

We then washed out the vagina. Seeing, of course, the presence of blood in the vagina, we washed out the vagina and made smears of the fluid there, spun that down and came up with the presence of spermatazoa or sperm.

Q. And that sperm is the male discharge, is it not? A. Yes, that is the emission of the male.

Q. Anything else that you did? A. We, of 393
course, examined the stomach content and we noted the presence of approximately five or six ounces of a yellowish gruel-like substance which we further examined and identified as a meat product and apple, the peel of a yellow apple which was present in the stomach content.

Q. Now, did you remove the clothing of the deceased? A. The clothing of the deceased was removed and was handed over to the police department.

Q. Now, Doctor, from your experience and from your examination of the body and from the re-

sult of the autopsy, which you performed, could you give us the cause of death of Sunday Graham?

Mr. Goodman: If your Honor please, I would most respectfully suggest that the doctor be limited to an opinion with reasonable degree of medical certainty.

The Court: I assume that is the question.

Mr. Cahn: Yes, I will accept that.

Q. Will you tell us what, in your opinion, with
395 any degree of medical certainty the cause of death of Sunday Graham was? A. Yes. The cause of death was due to asphyxiation due to smothering by the presence of the pair of pants that was impacted into the throat that closed the air way of Sunday Graham.

Q. Now, Doctor, you mentioned a mark on the throat of Sunday Graham. A. Yes.

Q. Do you have any opinion as to the cause of that? A. Yes. That mark is a very superficial mark and really has played a very insignificant role in the death of the deceased. The marks in-
396 dicated it to be superficial and indicate that an insignificant amount of pressure was applied by the belt on the deceased. This may be consistent of a mark that may be produced at the time the deceased was in the process of dying or the deceased was already dead. It really played no role in the death of the deceased.

Q. So, as I understand it, Doctor, from what you say, that in your opinion death was caused due to the suffocation as a result of the pants in the throat and that the belt around the neck played little or no part in causing the death; is that correct? A. That's correct.

Q. And it is your opinion that the belt had been applied after death or during the time of dying? A. Yes, that is correct.

Q. Now, Doctor, did there come a time when you saw that defendant, Willard Phillips? A. Yes, I did.

Q. When was that? A. I saw the defendant the same night that Sunday Graham was found and Inspector Pribyl and I went over to one of the local precincts and I saw the defendant there.

Q. Did you do anything in reference to the defendant? A. Yes, Dr. Pribyl— 398

Q. Who? A. Inspector Pribyl was talking to the defendant casually and he explained to him that certain tests were wanted to be performed, and the defendant willingly, in my presence, admitted to the examination of his penis, admitted to the examination for sperm.

Q. As I understand it, a washing was made? A. Yes, a washing was made.

Q. This was about what time, do you remember? A. This was, oh, in the vicinity of 7 to 7:30 to 8 o'clock.

Q. Did you do the washing? A. I did the wash- 399 ing.

Q. What was the result of that? A. No sperm was present.

Q. This was, as I understand it, you said, the same day that you saw the body, May 13th? A. That's correct.

Mr. Cahn: I have no further questions.

Cross examination by Mr. Goodman:

Q. Doctor, who accompanied you to police headquarters at the time that you conducted the test

for the washing of the defendant? A. I went over with Inspector Pribyl.

Q. The two of you went together? A. I went over in his car as I recall, yes.

Q. When you arrived there were you conducted into any particular room? A. Yes, I went upstairs on the second floor and I went into one of the rooms on the second floor.

Q. Did Inspector Pribyl accompany you? A. Yes, he did.

Q. When you got into that room did you see
401 the defendant there? A. Yes, he was there.

Q. Was there any other person other than yourself and Inspector Pribyl and the defendant present. A. Yes. There was either one or two other detectives there, police officers, in that room.

Q. Did they appear to have been engaged in conversation with the defendant as you entered? A. They were in conversation with the defendant.

Q. Isn't it true that he was seated in a chair and they were on each side of him talking to him? A. No. As a matter of fact, the defendant was seated on a chair and at one time was sitting on
402 the desk and the police officer other than Inspector Pribyl was sitting remote from the defedant at another desk a distance away.

Q. Did you conduct this washing test without having left the room after first entering it? A. Would you repeat that again?

Mr. Gordon: Would you read it, please.

(Last question read by stenographer.)

A. I entered the room, and as I recall I left the room and then I reentered the room about ten minutes or fifteen minutes later.

Q. Now, do you recall that you left the room? A. Yes, I did.

Q. At the request of Inspector Pribyl? A. That I don't recall, whether it was at the request of Inspector Pribyl.

Q. Did you have any other business in any other room in that building that night, Doctor? A. I believe I made another phone call but I don't recall any particular business other than the business of the deceased, Sunday Graham, or anything that may be related to any particular phone calls pertaining to that. 404

Q. I ask you now to recall, sir, and stress the importance of your answer. Did you leave that room of your own volition and without any invitation or suggestion from anyone? A. I was asked to leave the room, yes.

Q. Was it Inspector Pribyl who asked you to leave the room? A. I don't recall.

Q. Was it one of the other police officers? A. That I don't recall, either.

Q. Doctor, see if you can recall this. Isn't it true that someone in your presence asked the defendant if he would voluntarily submit to the test. He turned to you and said, "Doctor, I would like to have my own doctor or a lawyer present." Isn't that true? A. Part of it is true. 405

Q. And isn't it also true that when he made that statement in part that some police officer said to you, "Doctor, step out for a few minutes, please." A. Well, the conversation didn't run that way. It was more casual than you are presenting. The defendant said that he questioned the right of this test being performed and we told him—that is, Inspector Pribyl told him that it was a very insignificant test, which it is. It is

merely pouring a little water on the surface of the penis.

Q. But also might—

Mr. Cahn: Just a minute; let him finish.

Mr. Goodman: May I interrupt?

Mr. Cahn: No, you cannot interrupt an answer.

The Court: I am the Judge. Please address your remarks to the Judge. Let him finish.

407 Mr. Goodman: I respectfully submit I didn't need any assistance from the learned District Attorney in the manner in which I am trying the case.

The Court: Gentlemen, both of you address your remarks to the bench. Read the last question and answer.

(Last question and answer were read as follows by the stenographer:

"Q. And isn't it also true that when he made that statement in part that some police
408 officer said to you, 'Doctor, step out for a few minutes, please.' A. Well, the conversation didn't run that way. It was more casual than you are presenting. The defendant said that he questioned the right of this test being performed and we told him—that is, Inspector Pribyl told him that it was a very insignificant test, which it is.")

Mr. Goodman: If your Honor please, at that point I object.

The Court: You are arguing it is not responsive?

409

Mr. Goodman: Not responsive.
The Court: Sustained.

By Mr. Goodman:

Q. When you say this test is insignificant, would it be insignificant if it resulted in the man going to the electric chair?

Mr. Cahn: Just a moment. I object.
The Court: Objection sustained.

410

Q. Doctor, the defendant indicated to you a reluctance to submit to this test unless he had the opportunity of getting some advice; isn't that correct? A. The defendant said that while I was present.

Q. Right. And after he said that some police officer suggested that you leave the room; isn't that so? A. That was suggested, too.

Q. And you remained out of the room for about fifteen minutes, isn't that true? A. I would say about fifteen minutes. It may have been more or less. I don't recall.

411

Q. And, Doctor, while you were out of the room did you overhear what was said or done to and with the defendant? A. No.

Q. But when you came back fifteen minutes later he was perfectly happy to submit to the test; isn't that so? A. No, that is not.

Q. What happened when you got back, Doctor? A. He still was sitting on the desk and saying that he didn't want to submit to this test, and Inspector Pribyl, knowing the defendant on a past occasion, struck up a conversation with him and the defendant, knowing Inspector Pribyl, set up a mutual rapport with each other.

412 *Leslie Lukash—for People—Cross*

Q. All in your presence? A. That's right.

Q. And you knew about this prior relationship between the defendant and the Inspector? A. This is how I know about it, because it was done in my presence.

Q. I see. A. And then Inspector Pribyl told him that this was plain normal saline, which it was, because I was there when it was made up, and he told him that this fluid was plain water with a little dash of salt in it, and told him that it was just that; and, to prove it Inspector Pribyl
413 drank a little of the fluid, see. The defendant then, after a few more minutes of casual conversation, submitted to it quite willingly and without any objection.

Q. Did anyone, including yourself, tell this defendant that he had no obligation to submit to the test? A. As I recall, that was mentioned to him, that he did not have to do it if he did not wish to.

Q. Who said it, if you recall, Doctor? A. In the cross-fire of conversation, which I don't mean it to be a cross-fire, but in the conversation and
414 the defendant knew it himself, it was said that he did not have to submit to this if he did not wish to, and he didn't say it in those words but the inference was that and that the defendant likewise knew it himself without even being told about that.

Q. Did anyone tell he had the right to have a lawyer while the test was being conducted?

Mr. Cahn: Objection; irrelevant and immaterial.

The Court: I will take it.

Q. Do you recall that, Doctor? A. Would you repeat that?

Q. Did anyone tell him before the test was taken and before he submitted to the test, that he had a right to have a lawyer to advise him and to be present while the test was being conducted? A. That point, to my knowledge, was not made.

Q. Did anyone tell him that sperm had been found in the vagina of the victim? A. The examination on the defendant was made before the autopsy was performed on Sunday Graham.

Q. Did anyone tell him that if sperm were 416
found on his person after the test and if sperm were found on the body of the victim that fact may weigh heavily against him? A. Nobody mentioned that to the defendant.

Mr. Goodman: That's all.

Mr. Cahn: Thank you, Doctor.

VINCENT THORNTON, called as a witness on behalf of the People, being first duly sworn, testi- 417
fied as follows:

By the Clerk:

Q. What is your name? A. Vincent Thornton.

Q. Your assignment? A. Deputy Inspector, commanding Identification Bureau, Nassau County Police Department, Mineola, New York.

Direct examination by Mr. Cahn:

Q. Inspector, how long have you been a member of the Nassau County Department? A. About 19½ years.

418 *Vincent Thornton—for People—Direct*

Q. And what is your present position? A. I am Deputy Inspector, commanding the Identification Bureau.

Q. And how long have you been associated with the Identification Bureau? A. About 13 years.

Q. And just what kind of work does that constitute? A. We are responsible for all of the photography and all of the fingerprint work done for the entire county of Nassau. I myself am a designated fingerprint expert.

419 Q. And what is your background in that respect? A. I am a graduate of the Faurot Fingerprint School, have specialized in fingerprint idenfication over a period of approximately 15 years. I have testified in the County Courts of Nassau many times, in the District Courts of Nassau County many times, I have testified for the United States Government in the Federal District Court in Brooklyn, New York, and also for the County Court of Suffolk County.

Q. Inspector, are these any two people with similar or the same fingerprints? A. No, sir,

420 there are not.

Q. Did you on May 13, 1958 go to Commercial Avenue in Garden City? A. Yes, sir, I did.

Q. About what time did you get there? A. About 5 P. M.

Q. And what did you see when you got there? A. Behind the warehouse of public building material located at 5 Commercial Avenue, Garden City, the body of a colored female child, girl, about the age of 8, deceased.

Q. I show you People's Exhibit 15 and ask you if that is a true and accurate representation of the scene as you saw it. A. Yes, sir, it is.

421

Q. Now, what did you do when you got there, Officer? A. I supervised the taking of the photographs of the scene and immediately surrounding area.

I also supervised the processing of various articles in and around the area of the body, the processing for any fingerprints that were left behind, and about 5:30, about a half hour after I got there, under the immediate supervision of the Medical Examiner, Dr. Lukash, I removed a plastic belt from the neck of the deceased.

422

Q. I show you People's Exhibit 8 for identification, sir, and ask you if that is the belt you removed. A. Yes, sir, this the belt.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: No objection.

(Belt heretofore marked People's Exhibit 8 for identification now received in evidence and marked People's Exhibit 8 in evidence.)

Q. Inspector, did you process the belt for fingerprints? A. Yes, I did process the belt for the presence of any fingerprints and the result was negative.

423

Mr. Cahn: No further questions.

Mr. Goodman: No questions.

424 *Edward R. Lynch—for People—Direct*

EDWARD R. LYNCH, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your name? A. Lieutenant Edward R. Lynch.

Q. Shield number? A. Shield 66, Police Department, County of Nassau, Mineola, New York.

425 *Direct examination by Mr. Cahn*:

Q. Lieutenant Lynch, how long have you been a member of the County of Nassau Police Department? A. 22 years, sir.

Q. And with what department are you connected at the present time? A. Police Department, County of Nassau.

Q. What bureau, I mean? A. The Identification Bureau.

Q. And how long have you been a member of the Identification Bureau? A. Ten years, sir.

426 Q. And what is your work in the Identification Bureau? A. I am designated a fingerprint expert.

Q. And tell us something about your background in that field. A. I have attended the Faurot Fingerprint School and I have been supervised and instructed by the supervising personnel of the bureau, and as a result I classify and search fingerprints of all prisoners arrested in the county and also search for and develop and compare latent fingerprints, as my designated duties.

Q. Have you testified in court before? A. Yes, sir.

427

Q. In reference to fingerprints? A. Yes, sir.

Q. Lieutenant Lynch, are there any two people with the same fingerprints? A. No, sir.

Q. Now, Lieutenant, I show you People's Exhibit 11 and ask you if you have ever seen that car and did work on that car. A. I did, sir.

Q. And would you tell us what you did in reference to the car? A. Well, I processed the automobile with latent fingerprint developing powder and I developed a fingerprint on the right vent window of the front door.

428

Q. Do you have that window? A. I do sir (producing).

Q. And do you have a marking as to where the fingerprint was? A. The fingerprint is 3½ inches above this (indicating) and one inch back from the chrome strip.

Mr. Cahn: I ask that this be marked for identification at this time.

(Window marked People's Exhibit 17 for identification.)

429

Q. And what else did you do, Lieutenant? A. I processed that window along with the interior of the vehicle. The result is I found another fingerprint on the instrument panel.

Q. And did you continue your investigation? A. Yes, on investigation of the fingerprints and as a result of photographing and identification I identified the latent fingerprint on the instrument panel as the right finger—rather, on the left side, as the left middle finger of Willard H. Phillips.

Also, I developed the latent fingerprint after photographing it, on the vent window, I identified

it as the left index finger of Sunday Graham, deceased.

Q. Did you cause to be taken the fingerprints of Sunday Graham, the deceased? A. I did, sir.

Q. You say you took a photograph of the fingerprints on People's Exhibit 17 for identification? A. I did, sir.

Q. And you say in your opinion that this is the fingerprint of Sunday Graham? A. It is, sir.

Mr. Cahn: I now offer that People's Ex-
431 hibit 17 in evidence.

Mr. Goodman: If your Honor please, it has not been established when that print was placed there and I must respectfully object. It could have been a week before. There is no dispute that the child has ridden in the car. The mother admitted it on the witness stand.

The Court: The objection is taken that it is incompetent and immaterial, is that the basis of the objection?

Mr. Goodman: Absolutely, and too re-
432 mote.

The Court: When did you examine this, Detective?

The Witness: On the morning of May 14th.

The Court: It goes into evidence for what it is worth. Overruled. It is admissible.

Mr. Goodman: May I be given the opportunity of a voir dire?

The Court: Yes, you have an opportunity for a voir dire before it is admitted.

433

By Mr. Goodman:

Q. Lieutenant Lynch, is there anything known to science by which any expert in the fingerprint field can fix and determine even approximately the time when a print was imprinted on an object such as that window there? A. No, sir.

Q. So that it is impossible, is it not, Officer, that the print that you found of Sunday Graham could have been implanted there on May 11th or May 10th or May 9th? A. No, sir.

434

Q. It is not possible?

The Court: Wait a minute. This is a voir dire, not a cross examination.

Mr. Goodman: Yes. My point is whether this should go into evidence.

Q. My question is merely this, Lieutenant: is it not possible that the print of Sunday Graham which you found on that—I believe it is a no-draft window—could have been implanted on that piece of glass at some time prior to May 13, 1958? A. Yes, sir.

435

Q. Could it have been May 10, 1958? A. It could have been, sir.

Q. Could it have been May 1, 1958? A. Well, the fingerprint reacted very well to the latent developing powder and taking into consideration all the climatic considerations and all, that print developed very well. It is not an old print; it is a new print.

Q. But in any event, Lieutenant, you certainly cannot state under oath that that print was imprinted on that glass on May 13, 1958, can you? A. No, sir.

436 *Edward R. Lynch—for People—Direct*

Mr. Goodman: I most respectfully renew my objection to the receipt of that window in evidence.

The Court: Motion denied.

Mr. Goodman: I respectfully except.

(Window heretofore marked People's Exhibit 17 for identification now received in evidence and marked People's Exhibit 17 in evidence.)

437 *By Mr. Cahn:*

Q. Now, Lieutenant, you told us that you took a photograph and a blowup of the fingerprint? A. Yes, sir.

Q. Do you have that? A. Yes, sir.

Q. May I have it, please?

(Witness produces photograph.)

Q. Did you also take a photograph and blowup of the fingerprints of Sunday Graham? A. I did,
438 sir (producing).

Mr. Cahn: I offer them both in evidence as one exhibit.

Mr. Goodman: Well, I make the same objection.

The Court: You better offer them as two exhibits, Mr. Cahn.

Mr. Goodman: Same objection that I made with respect to the prior exhibit; namely, that it is too remote.

The Court: Objection overruled. Put them in as separate exhibits.

Mr. Goodman: I respectfully except.

The Court: Which one is this?

The Witness: This is the fingerprint impression of the right vent window.

(Fingerprint on vent window received in evidence and marked People's Exhibit 18 in evidence; other photograph received in evidence and marked People's Exhibit 19 in evidence.)

By Mr. Cahn: 440

Q. Lieutenant Lynch, would you tell us with the use of People's Exhibits 18 and 19 the basis of your opinion that the fingerprint found on People's Exhibit 17 was the same as the fingerprint of Sunday Graham? A. Yes, sir. In People's Exhibit 18, the fingerprint impression on the right vent window, you will notice a characteristic designated No. 1. This characteristic, if you follow the red line, leads to a bifurcation. A bifurcation is a ridge that at one point forms two ridges. 441

And on People's Exhibit 19, the impression of the left index finger of Sunday Graham, the No. 1 red line will lead you to a bifurcation. The same impression that is found here (indicating) is also found in the left index finger of Sunday Graham.

On characteristic No. 2 if you follow it up you will see another bifurcation that is on this characteristic No. 1. In the fingerprint impression on the right vent window from characteristic 1 you go over to characteristic No. 2, the bifurcation that I originally referred to.

442 *Edward R. Lynch—for People—Direct*

Characteristic No. 3, following that line down you will notice that a bifurcation forms and that appears as characteristic No. 3 on this fingerprint impression, and by following characteristic No. 2 down you will come to the bifurcation designated as No. 3.

On characteristic No. 4, you take characteristic No. 3, there is one ridge in between and another bifurcation forms on that ridge.

On characteristic No. 4 on the right vent win-
443 dow, if you follow it over and above from that ridge you will see where the ridge forms two ridges, which is also, as I told you, a bifurcation.

Taking characteristic No. 5 from characteristic No. 4, you go one ridge over and again you will see another bifurcation, a ridge where at a certain point it forms two ridges.

On characteristic No. 5, take 4 and follow it up one over and you will find characteristic bifurcation No. 5.

On characteristic No. 6 you go back to No. 5 you have one single line going along vertically, going upward, and you will come to a bifurcation
444 designated No. 6; and on the fingerprint impression on the right vent window from characteristic No. 5 you go up and you find where characteristic No. 6 appears.

On People's Exhibit 19 from characteristic No. 6 you go over one ridge, following along, and you will see that a bifurcation is again found. This is characteristic No. 7.

On characteristic No. 6 go back down that ridge and over and you will find characteristic No. 7, another bifurcation.

From characteristic No. 7 going upward and counting over one ridge you will see an ending

ridge. An ending ridge is a ridge that ends abruptly.

Going over to characteristic No. 7, upward and over here you will find characteristic No. 8 here, an ending ridge that ends abruptly.

Returning to People's Exhibit 19 from characteristic No. 8 you go here and go over one, two, three, four, five, six, and you come to another bifurcation, characteristic No. 9.

From characteristic No. 8 the ending ridge, you drop down one, two, three, four, five, six, and you will see the bifurcation characteristic No. 9. 446

From characteristic No. 9 dropping down one ridge you will notice characteristic No. 10, another bifurcation.

On People's Exhibit 18, characteristic No. 9, by dropping down you will come down to a bifurcation which is similar to the bifurcation on People's Exhibit 19.

Returning to characteristic No. 10 and following that you will notice characteristic No. 11, an ending ridge, on People's Exhibit 19.

Characteristic No. 10, by following the line of that bifurcation out you will come to the ending ridge. 447

On characteristic No. 11, returning to it, and following that you will come to a short ridge, a ridge of limited length. Characteristic No. 12.

You will notice in People's Exhibit 19 also characteristic No. 11, and you will also see a short ridge, characteristic No. 12.

It is my opinion that the fingerprint impression on the left vent window is the fingerprint impression of Sunday Graham.

Q. Did you find any dissimilarity? A. No, sir.

448 *Edward R. Lynch—for People—Direct*

Mr. Cahn: You may examine.

Mr. Goodman: If your Honor please, I have previously objected to the receipt in evidence of the vent and also of the two photographs to which the officer has referred.

I respectfully submit, if your Honor please, that what has occurred here has in effect placed the defendant in a position where he must prove something instead of the People proving that Sunday Graham was in this automobile on this particular day, and we now
449 find ourselves in the uncomfortable position through your receiving these exhibits of attempting to prove that she had been in the automobile before that.

I submit, if your Honor please, if I can establish from the evidence already before this Court that the child could very well have been in this automobile, I would respectfully submit that your Honor should reconsider your ruling and strike these exhibits from the case.

I respectfully refer to the record of this
450 trial yesterday at page 55, cross examination by myself of the mother of this child:

"Q. Incidentally, he knew—" he, referring to the defendant—"he knew Sunday, did he not? A. Yes.

"Q. He never met the child in your home, did he? A. No, I don't think he saw her there.

"Q. But you saw fit to bring Sunday into this man's company, did you not? A. She was in his company.

451

"Q. As a matter of fact, the three of you went out very frequently on little social outings of sorts, did you not? A. Not frequently, no.

"Q. Sometimes? A. We were out, yes."

In the light of that, if your Honor please, I respectfully submit that there is sworn evidence in this record that the child was in that automobile before this day and that this is entirely too remote and its reception would be most prejudicial to the defendant.

452

The Court: Counselor, I deny your application and your motion. What you have brought out has a bearing upon how strong this testimony is. It depends upon the weight of the testimony, not upon its admissibility into evidence. Motion denied.

Mr. Goodman: I again respectfully except. No questions.

Mr. Cahn: May we adjourn now for lunch? That is all I am prepared for this morning.

The Court: All right, we will recess until 2 o'clock.

453

Gentlemen of the jury, you will not discuss this case amongst yourselves or with anyone else until you finally deliberate in the jury room at the end of this case.

(A recess was thereupon taken for luncheon.)

454 *Frank G. Pribyl—for People—Direct*

AFTERNOON SESSION

FRANK G. PRIBYL, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your name? A. Inspector Frank G. Pribyl, commanding officer, Technical Research Bureau, Police Department, County of Nassau.
455 Home address, 22 Washington Avenue, Glen Head.

Direct examination by Mr. Cahn:

Q. Inspector, how long have you been a member of the Nassau County Police Department? A. 19½ years, sir.

Q. And what is your command at the present time? A. I am in charge of the police laboratory. We call it the Technical Research Bureau.

Q. And would you give us something of your
456 background, sir? A. I am a graduate of Columbia University, year 1936. I am a registered pharmacist in the State of New York, holding license 14994.

I joined the Police Department, County of Nassau, in April, 1939. I was assigned to the sixth precinct at that particular time, until September, 1942, when I was brought into the laboratory.

In February, 1945 I was made commanding officer and I have been in that capacity ever since.

My work in the laboratory field is in the field of chemical analyses, examination of substances, blood and so forth.

457

Q. Have you been testifying in courts in reference to chemical analyses, blood analyses, and in reference to the work of the police laboratory? A. Yes, sir, I have.

Q. And how often have you been testifying in the courts? A. I have testified possibly over 500 times since I have been in the Police Department.

Q. On May 13, 1958 did you go to Commercial Avenue in Garden City? A. Yes, sir, I did.

Q. And about what time did you arrive there? A. At 4:56 P. M.

458

Q. And what did you see when you got there? A. I saw the deceased, a Negro girl, lying on her back behind the building on Commercial Avenue there.

Q. I show you People's Exhibit 15 in evidence and ask you if you can identify that for us, or if this is a fair and accurate representation of what you saw. A. Yes, sir, it is.

Q. Did you do anything at the scene, sir? A. Yes, sir. Some blood was found on an asbestos shingle beneath her buttocks where the deceased was lying. I took a sample of that blood and tested it at the laboratory and determined it to be humand blood, group B, sub-type MN.

459

Q. I show you this picture and ask you if that is an accurate and fair representation of the blood that you said you saw. A. Yes, sir, it is present here right on the photograph (indicating).

Mr. Cahn: I offer it in evidence.

Mr. Goodman: Do I understand that this is a photograph taken at the scene after the child's body had been removed?

The Witness: That is correct.

Mr. Goodman: No objection.

(Photograph received in evidence and marked People's Exhibit 20.)

460 *Frank G. Pribyl—for People—Direct*

Q. And where did you say that this asbestos shingle was when you saw it with the blood on it? A. It was right beneath the buttocks of the deceased as she lay there.

Q. And you said you examined it and typed it and found it to be type B? A. That's right, group B, subtype MN.

Mr. Cahn: Detective Stark, do you want to leave the room?

461 (Detective Stark left the courtroom.)

Q. After that, Inspector, what, if anything, did you do? A. After that I left the scene with Dr. Lukash and we went to the third precinct station house in Mineola.

Q. About what time did you arrive there? A. About 7 P. M.

Q. And where did you go? A. We entered the back way through the station house and went upstairs to the detectives' squad room, and we entered a room in which the defendant, Willard
462 Phillips, was sitting.

Dr. Lukash and I entered the room with the defendant. I believe Detective Stark and Detective Rofheart were present in the room when we entered.

I went to the defendant. He knew me. I spoke to him. I told him what I was there for and asked him for his permission to take various tests. I told him we wished to take a—wash his penis. That also I was going to scrape his fingernails, and we wanted to examine his clothing.

He was hesitant in giving his permission. I talked to him for a couple of minutes. He still

didn't—he was hesitant in his answering yes or no. I thought him knowing me and I knowing him that—

Mr. Goodman: If your Honor please, I would object to anything with respect to the operation of the witness' mind.

The Court: Sustained.

The Witness: Thinking I could gain the—

Mr. Goodman: I will again make the same objection and ask that the witness be admonished with respect to what he thought. 464

The Court: Just tell what you did.

The Witness: I thought I would like to speak to the defendant myself—

Mr. Goodman: Same objection, your Honor please.

The Court: Inspector, just tell us what you did and not what you thought or what someone else thought.

The Witness: I asked Detective Rofheart, Detective Stark and Dr. Lukash to leave the room and they did so, and I was sitting there in a chair in front of the defendant, who was also sitting in a chair, and I was speaking to him. 465

Q. Was anybody in the room with you at this time? A. No, sir. I explained the tests all over again. I explained the penis washing and Mr. Phillips indicated he did not know who Dr. Lukash was. I told him he was the Chief Medical Examiner, he was a doctor.

I explained the test that—I had a bottle, a flask, containing some salt solution that was not harmful, and we just wanted to wash his penis. And the other tests all over again.

He still was hesitant. He didn't say yes or no. So I said, "Willard, did you do this thing?" And he said no.

So then I said, "Then why are you hesitating in giving us permission to take this particular test?"

He said nothing. I spoke to him another few minutes, the total time I guess was about ten or a few more minutes. Then I thought I was not getting anywhere and I asked Detective Stark, Detective Rofheart and Dr. Lukash to come back.

467 As soon as they came back I introduced Dr. Lukash to the defendant and they shook hands. And then I said, "Are you willing now to go ahead with the test?" Then I pointed to the bottle which was on the desk. I said, "The solution is harmless. It is only salt in water."

Thinking that—I asked Detective Rofheart to go out and get a dixie cup. I then said to the defendant, I said, "Would you like the advice of someone else or do you want another doctor to perform this?" He said no.

468 Detective Rofheart came back and with the Dixie cup, and I took the cork off the flask and poured some in the Dixie cup and I said, "Willard, this is harmless," and I drank it down. I said, "Does that show you that I am not trying to put anything over on you? That is harmless."

He indicated yes and I said, "Are you willing now to go through the test?" And he said yes.

And then we performed the penis washings and made the particular fingernail scrapings and examination of the clothing.

By Mr. Cahn:

Q. Now, as far as the penis washing was concerned, Inspector Pribyl, was that to seek the presence of sperm? A. Yes, the idea of the penis washing was to examine the washings, which I did later at Meadowbrook Hospital, and we found none. The examination of the slide produced by the penis washing was negative for spermatozoa.

Q. And the fingernail scrapings—the purpose of that, I presume, was to find the presence of any blood? A. That is correct. 470

Q. And how did that turn out? A. All ten individual fingers were negative for blood.

Q. Did you at this time take the clothing of the defendant? A. Yes, sir, I did.

Q. Did you examine the clothing of the defendant? A. I did.

Q. The clothing that you received from him at the time? A. Yes, sir, I did.

Q. Was there other clothing of the defendant that you got in your possession? A. Yes, sir, there was.

Q. I show you this pair of undershorts and ask 471 you if you can identify that for us. A. Yes, this is a pair of undershorts labeled B.V.D. which was taken from the defendant's room and brought to me in the laboratory, and on the morning of May 14, 1958 at 11:30 a. m. the defendant Willard Phillips placed his initials on there, W. H. F. indicating those were the shorts that were his.

Mr. Cahn: Offered in evidence.

Mr. Goodman: At this time, if your Honor please, I fail to see any connection. I can't

see any relevancy and I must object upon that ground.

The Court: All I can do is put it in subject to connection, and renew your application later on. I will take it subject to connection.

(Article of clothing referred to received in evidence and marked People's Exhibit 21.)

Q. Did you make an examination of People's Exhibit 21 in evidence, Inspector Pribyl? A. I
473 did.

Q. Will you tell us, sir, what type of examination you made and the results thereof. A. I made an examination for blood and seminal staining. No seminal staining was found. On the inside to the left below the crotch area was a slight reddish-brown and stained area. A small part of that material was cut out. I was able to determine that the stain was blood. I was unable to determine that it was human blood.

Q. I show you these, People's Exhibit 21, and ask if you can show the Court and jury, if you
474 will, please, where the blood was found by you. A. There is the inside of the garment and here is this reddish-brown staining that was present and the little small hole in the fabric which I cut out to make my particular test (indicating).

Q. I show you this, sir, and ask you if you can identify that for us. A. This is a white T-shirt labeled Arrow. At also the same time the defendant Willard Phillips was present at the laboratory on May 14, 1958 at 11:30 a. m. he identified this as being his T-shirt placing thereon his initials W. H. P.

Q. Did you make an examination of that, sir? A. I did.

Q. Will you tell the Court and jury, if you will, what type of examination you made and what the results thereof were. A. Again, I made an examination for the presence of seminal staining. None was found. For blood staining a group of small light brown, reddish brown spots were observed on the lower front of the shirt near the hem which I have encircled here in yellow crayon (indicating). Again, all my tests could determine 476 that it was blood but I could not make a human blood test due to the amount that was present and the soiled condition of the shirt.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: Same objection, if your Honor please, which I now make to the prior exhibit received subject to connection. The mere fact that there was found on these garments something which was blood but no one knows whether or not it was human blood or whether or not it was the defendant's, or when it was put on certainly makes them im- 477 material, incompetent and irrelevant.

The Court: Let me ask.

By the Court:

Q. In your investigation did you ask the defendant if he wore those clothes on May 12th? A. No, sir. All I asked the defendant was were these his clothes and he answered yes.

The Court: Come up, Mr. Cahn and Mr. Goodman.

478 *Frank G. Pribyl—for People—Direct*

(Conference at bench not within hearing of stenographer or jury.)

The Court: Objection overruled.

Mr. Goodman: I respectfully except.

The Court: Put it in for what it is worth.

Mr. Goodman: So the jury would understand, if your Honor please, would you advise them that you are putting it in evidence for whatever it is worth and they are to determine whether it has any probative value
479 or not.

Mr. Cahn: Certainly. I go along with that.

The Court: That's right.

(Article of clothing referred to received in evidence and marked People's Exhibit 22.)

Q. I believe you said that you could not test for human blood or the type of blood because of the small amount of blood that was present in both exhibits? A. I didn't say I didn't test. I attempted to make a human blood test but I couldn't make any positive determination. All I could de-
480 termine positively was that it was blood.

By the Court:

Q. Were you able to determine whether those garments had been washed before or after the blood staining? A. No, sir, they were not washed.

The Court: All right.

By Mr. Cahn:

Q. How long were you at the Third Precinct, Inspector Pribyl? A. I believe about an hour.

Q. That would make it, I assume, until about 8? A. That is correct.

Q. Thereafter what did you do? A. I left with Dr. Lukash and we went to Meadowbrook Hospital for the autopsy.

Q. Yes; and what happened there? A. Well, started at 9:25 p. m. Dr. Lukash removed the clothing from the deceased and gave them to me as they were removed.

Q. I show you People's Exhibit 6 for Identification and ask you if you can identify that for us. 482
A. This is the pair of panties which was removed from the deceased's mouth by Dr. Lukash and turned over to me at 9:40 p. m. on May 13, 1958.

Mr. Cahn: Offered in evidence.
Mr. Goodman: No objection.

(People's Exhibit 6 for Identification now marked in evidence.)

Q. I show you People's Exhibits 3, 4 and 5 for Identification and ask you if you can identify those for us. A. Well, People's Exhibit No. 3 was 483
given to me by Dr. Lukash when he removed same from the body of the deceased. The insignia OLLS is on this dark navy blue uniform dress.

People's Exhibit 4 is the white blouse labeled "American Institute of Laundering". This was received from Dr. Lukash, and that is People's Exhibit 4 for Identification.

And this red sweater—red wool jacket as I put in my notes—was removed by Dr. Lukash from the deceased's body which is labeled People's Exhibit 5 for Identification.

Mr. Cahn: I offer People's Exhibits 3, 4 and 5 for identification in evidence.

Mr. Goodman: No objection.

(People's Exhibits 3, 4 and 5 for Identification now marked in evidence.)

Q. What, if anything else, took place at the autopsy? A. Well, I received all the clothing that was on the deceased. On the pair of panties taken from the mouth I found a few hairs which I placed
485 in a separate envelope. I received a blood sample of the deceased which was typed and also showed to be Group B sub-type MN.

Q. Is that the type and group of blood that you found on the asbestos shingle at the scene? A. That is correct, the same type. There were some black hairs which I found on the red sweater of the deceased, Sunday Graham. The hairs which I took from the panties which was taken out of the mouth of the deceased. I also—Dr. Lukash took some slides, took a smear from the vaginal orifice of the deceased.

486 I examined those slides and the presence of spermatazoa was confirmed.

A number of peanut shells and hulls were taken from the hair of the deceased. I have those here.

A hair was also taken from under the right leg of the deceased near the buttocks.

Now, these hairs, the hair I took from the right leg of the deceased and the hairs that I found on the panties were examined later in the laboratory by myself. They were determined to be hairs from one of the negroid race. They are identified as being pubic hairs. On May 14, 1958 at the laboratory—

Q. May I interrupt you there, Inspector Pribyl, for just one moment and ask you how you make the determination of negroid hair and pubic hair. A. Well, the hairs themselves are examined. There are portions of a hair filament which are examined and looked at under the microscope. There is the medulla, the innermost core of the hair, the cortex which is the middle layer containing the pigment granules and the outer layer, the cuticula, which has a cellular formation like a scaling on the outside of the particuar hair itself.

And there are the three main races in this 488
world: the white race, the yellow race and the negroid race. The hairs vary in their examination, sometimes as to thickness, as to the pigment, and their cross section. As you cross section them and look at them under the microscope they have different appearances, where the yellow race is more larger or a thicker hair, the white race and negroid vary to some extent, but in thickness they are approximately the same. In the negroid race you have more of the kinky and curly type hair. Under examination of the longitudinal section of the hair, the hair is black and opaque. The 489
cross sectional there is ovoid or a flattening of the circular pattern of the hair and the medulla structure is off center, and the pigment granules are spread out along the outer edge as you look at it under the microscope.

All these things are different in the examination of the hairs. That is why in this particular case I say they had the negroid characteristic, and from the kinky and small structure of the hair they were identified as being pubic hairs; and, as I said before, when the defendant Willard Phil-

lips was in the laboratory on May 14, 1958 the time he identified the clothing to me I took a sample of his pubic hairs and they were compared in comparison with the hairs which I identified as being pubic hairs from the panties and also the right leg of the deceased. All the characteristics which I described as being in the negroid race were present in all three of the samples.

Q. Were there any dissimilarities? A. No, sir, there were not.

491 Mr. Goodman: I didn't hear your last question.

Q. Were there any dissimilarities? A. No, sir, they were all similar.

Q. Now, did there come a time, Inspector Pribyl, when you examined the car of the defendant? A. Yes, sir, I did.

Q. I show you People's Exhibit 11 in evidence and ask you if that is the car you examined. A. Yes, sir. This is a black 1955 Plymouth Belvedere sedan, registration 8R8292 New York. I exam-

492 ined that car on May 13 and May 14.

The examination of this automobile revealed—the examination, of course, of the trunk contained work clothes, boots, suitcases, paints, and various tools, but the interior of the car I removed some peanut shells and hulls found on the rear floor of this sedan owned by the defendant.

I also removed some peanut shells and hulls found on the front floor of this particular sedan.

I also removed a strand of hair taken from the right center door frame, the separation of the front and rear doors on the right side.

493

Q. Before you go any further, I show you this picture and ask you if that is a fair and accurate representation of the floor of the car as you saw it. A. Yes, sir, it is, with these two pieces of concrete that were present there.

Mr. Cahn: I offer it in evidence.
Mr. Goodman: No objection.

(Photograph received in evidence and marked People's Exhibit 23.)

494

Mr. Goodman: If your Honor please, I note that occasionally the witness refers to some papers in the questioning of him. I assume that they are his notes. May I respectfully request that proper foundation be laid for the right of the witness to refer to them?

By Mr. Cahn:

Q. I show you this paper and ask you if that is a fair and accurate representation of the floor of the defendant's car, this picture? 495

Mr. Goodman: I don't believe that Mr. Cahn intends to deliberately ignore me, but—
The Court: No, you haven't reached that point. Let us wait until we get past the picture and then we will go into that. He is just identifying the picture.

A. This is a picture showing the interior of the car and part of the seat.

Mr. Cahn: I offer it in evidence.

Q. Could you tell me, Inspector Pribyl, whether that is the front or the back of the car? A. That is the back seat of the particular automobile.

Mr. Goodman: No objection.

(Photograph received in evidence and marked People's Exhibit 24.)

Q. Now, referring to People's Exhibits 23 and 24 in evidence, with particular reference to those little white things in there (indicating), could you tell us what they are? A. Yes, sir, those are small fragments of peanut shells and hulls which I removed and have here in an envelope. This material here (producing).

Mr. Cahn: I offer it in evidence.

Mr. Goodman: I will consent that that be received for whatever it may be worth and I don't see so much worth there.

Mr. Cahn: Nobody asked you.

(Article referred to received in evidence and marked People's xhibit 25.)

By Mr. Cahn:

Q. Do you have the shells which were removed from the deceased's hair? A. Yes, sir, I have (producing).

Mr. Cahn: I offer them in evidence.

Mr. Goodman: Same concession.

(Shells received in evidence and marked Peoeple's Exhibit 26.)

Q. Now, did you make any examination in reference to People's Exhibit 25 in evidence and People's Exhibit 26 in evidence, Inspector Pribyl? A. I did. I examined them both at the laboratory and found out they both were peanut shells and hulls. In both instances.

Q. Could you establish what family of nut they were? A. It was a peanut because on the floor of the car there is a half of a peanut present in that particular group of evidence which I removed from the floor.

500

Q. And both the hulls or shells found in the hair and on the floor of Willard Phillips' car were peanut shells? A. Yes, sir, they were.

Mr. Cahn: If you need your notes to refresh your recollection, Inspector, will you ask the Court, please?

The Witness: Yes, sir.

Mr. Goodman: I submit that is no foundation for—

The Court: At the time you made this investigation did you transcribe your findings into any regular report that you use in your department?

501

The Witness: Yes, I did.

The Court: And are you capable of remembering without the use of those notes the various matters that are put to you now by the District Attorney?

The Witness: Everything precisely, no, sir.

The Court: Are you using these notes to refresh your recollection or to read from?

The Witness: To refresh my recollection. When a question is asked me I look and then I testify.

The Court: Proceed.

By Mr. Cahn:

Q. I show you this picture, Inspector Pribyl, and ask you if you can tell me whether or not that is a fair and accurate representation of the inside of the defendant's car which you examined. A.
503 Yes, sir, it is. That is taken from the left side of the car looking across the back seat and going out the right side.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: I assume that this photograph was taken at or about the same time as the others now in evidence?

The Witness: Yes, sir.

Mr. Goodman: And that was when, Inspector?

The Witness: On—I don't know whether
504 those photographs were taken on May 13th or May 14th. I don't know.

Mr. Goodman: But in any event no later than May 14th?

The Witness: That is correct.

Mr. Goodman: No objection.

The Court: Mark it in evidence.

(Photograph received in evidence and marked People's Exhibit 27.)

505

By Mr. Cahn:

Q. Now I show you People's Exhibit 27 in evidence, Inspector Pribyl, and ask if you on that picture can indicate where it was that you found the hair? A. I found this hair eighteen inches up from the floor on this right center door separator between the front and back doors, as you can see it in the photograph here (indicating).

Q. Would you mark with the letter H where you found it? A. (Witness complies.)

506

Q. Now, did you do anything in reference to the hair which you found as you marked on People's Exhibit 27, which I just showed you? A. Yes, sir. Back at the laboratory it was mounted on a slide and compared with some of the hair which was also mounted on a slide which I received at the time of autopsy from Dr. Lukash.

And again the hair was examined and it was determined that it was from the negro race, that it was scalp hair, that it was curly, and the same characteristics again were noted of the thickness —in relation to thickness, the pigment structure and the outside particular area were all similar.

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Q. You said the hair you received at the time of autopsy. Are you talking about the hair of Sunday Graham? A. The hair of the deceased Sunday Graham, yes, sir.

Q. And you compared that hair with the hair you found in People's Exhibit 27, which you just saw, and you found what? A. That they were similar in all the characteristics as I mentioned of the examination of the hair on a longitudinal and cross section; that it was of the negroid race and that the characteristics in the various layers were all alike.

508 Q. Any dissimilarity? A. No, sir.

Q. Did Sunday Graham have any pubic hairs? A. No, sir.

Mr. Cahn: You may examine.

Cross-examination by Mr. Goodman:

Q. When you arrived at the police precinct with Dr. Lukash did the two of you immediately go into the room where the defendant was? A. Well,
509 we entered the station house, we went upstairs in the squad room, and I knocked on the door and we entered, yes, sir.

Q. You and the doctor entered together? A. That is correct.

Q. And when you entered the room who was there? A. Detective Rofheart and Detective Stark.

Q. Any other officers? A. No, sir.

Q. Did you immediately ask the defendant if he would submit to the washing? A. As soon as I got in there I went over to the defendant—he
510 was only a suspect at that time; he was only in for questioning. I went over to him and he indicated he knew me. And I started talking to him and telling him what I was there for.

Q. Did you tell him that you were there to make tests upon him? A. I was there—I told him that we had to get his permission to take the tests, yes. If he would permit me to take the tests.

Q. And he appeared reluctant, is that correct? A. Yes, he was hesitant and reluctant at that particular time.

Q. Did there come a time when you stopped and pointed out to him that this was a harmless test

and that if he were innocent he had nothing to worry about, and in that fashion persuade him? A. I talked to him, yes. I told him it was harmless. As I mentioned before, he didn't know who Dr. Lukash was and that's why I introduced them and that's why I drank the saline solution, because—

Q. Inspector, permit me to interrupt you, if you don't mind. While you were having this particular type of conversation with the defendant was Dr. Lukash in the room or had he come back? A. Well, I spoke to the defendant in front 512
of Dr. Lukash for a few minutes and then that's when I asked them all to leave and I spoke to the defendant alone, and then they all came back in the room later on.

Q. Now, when you asked them to leave did you speak to the defendant in the fashion you now describe? A. Yes, sir, I did.

Q. And when you asked Dr. Lukash to return did you again speak to the defendant in the fashion you describe? A. In the same way, sir.

Q. Both while the doctor was out and after he returned? A. That is correct. 513

Q. Nevertheless you did, did you not, Inspector, see fit to ask the doctor to leave while you spoke to the defendant in exactly the same fashion as you spoke to him when the doctor returned? Is that correct? A. That is because I felt I could gain the confidence of the defendant alone, because he knew me.

Q. It was not because you didn't want the doctor to hear the manner in which you persuaded the defendant, was it? A. No, sir.

Q. At any time did you tell the defendant that the reason you wanted him to submit to these tests was so you could establish his guilt? A. No, sir.

Q. You didn't tell him that, did you? A. No, sir, because I asked him if he did this thing and he said no. And I said, "Then why, Willard, do you refuse or not want to go through with these tests, if you are innocent?"

Q. Inspector, isn't it the fact that the reason you were attempting to persuade this man to
515 submit to the tests was so that you could establish his guilt? A. No, sir. I—

Q. Just no, sir, please. You didn't want to know whether he was guilty; just wanted to make the tests? A. Oh, that is definitely true. When we investigate a case—he was at that time brought into the third precinct station house for questioning, and in our routine investigation of a particular case at the laboratory, or if they feel—if the detectives feel that the laboratory can aid in their investigation we are requested to do so, and in this particular case I was requested to go there and
516 make a certain type of examination. If the evidence we find in the laboratory is against him, why, then they are held prisoner. If it is for or shows nothing, then the party who is suspected is let go.

Q. I now ask you, Inspector, did you tell this man that "if you submit to this test and if it proves positive it will be held against you?" Did you tell him that in words or substance? A. No, sir, I did not.

Q. In other words, you used other methods to persuade him to submit without telling him that,

is that right? A. I just talked to him as I am talking right here now. I tried to explain to him, I explained the particular tests and told him exactly what we were going to do.

Q. Did you tell him that he had the right to the advice of a lawyer? A. I asked him if he would like the advice of someone else, or his own doctor, to what we call perform the tests, thinking that he was afraid of Dr Lukash or didn't know who Dr. Lukash was. And he said no.

Q. Did you want to add something further? 518
A. No, that's all.

Q. At any time did Phillips tell you that he would like to use the phone to call a lawyer? A. No, not me, sir.

Q. Did you ask him if he wan[illegible]o? A. No, sir, I did not.

Q. Referring now to the pubic [illegible] which you found on the body of the victim, can you tell me whether or not there was anything so distintive about them whereby you could pinpoint the individual from whom they came? A. Pinpoint the individual? You can't do that in hair examination, ever. 519

Q. That is true, is it not, Inspector, that the only thing that you can determine from even microscopical examination of hair is the race of the individual from whom the hair came? Isn't that so? A. That is correct.

Q. As a matter of fact, you can't even identify the sex of the individual from whom the hair came by a microscopic examination, can you? A. It is very difficult.

Q. Are you prepared to state at this moment, Inspector, based upon your experience and your

520 *Frank G. Pribyl—for People—Cross*

scientific knowledge, with a reasonable degree of scientific accuracy that the peanut shells that you found in the hair of this child were identical with the peanut hairs that you found in the back of that automobile?

Mr. Cahn: You said peanut hairs.

Mr. Goodman: I'm sorry, peanut shells.

A. Can I positively say they were one and the same? No, I cannot. They were peanut shells
521 and hulls.

Q. Have you any idea as to how many peanuts are sold in the village of Hempstead in the course of one day? A. I have no knowledge of that.

Q. Will you concede that it is a great amount? A. It could be, yes.

Q. Referring now to the hair which you found in the back of the car, Inspector, is it your testimony with respect to the identity of that hair—is it the same as it was with respect to the pubic hair concerning which we spoke a few minutes ago? A. Yes. You cannot pinpoint that it came
522 exactly from the deceased, no, sir.

Q. Can you from anything you observed tell us when it was that either the hairs that you found or the peanut shells that you found were first placed at the point where you found them? Do you follow me? A. No, will you please repeat that?

Q. I will withdraw the question. Was there anything about the peanut shells which you found on the floor of the car which would in any way aid you in determining when they first reached that point? A. No, sir, there is nothing.

Q. Was there anything about the peanut shells which you found in the hair of the child which would in any way aid you in determining when they first got in the child's hair? A. I couldn't tell you that, no. They were there at the time I first saw the deceased at the scene and we removed them at the time of autopsy.

Q. Inspector, did you thoroughly and completely and microscopically examine the defendant's automobile? A. Not microscopically. But I examined it visually, yes.

524 Q. I meant to merely characterize. My point was, did you examine it as thoroughly as you in your own opinion determined was necessary to find all possible evidence? A. Yes, sir, I did.

Q. Did you find anything besides the hair and the peanut shells which you have mentioned? A. Oh, there was other debris seen, yes.

Q. Anything that you considered as of evidentiary value in this case? A. No, sir, there was no blood.

Q. There was no blood, was there, Inspector? A. No, there was no blood in the car and no seminal staining, either. Because an examination 525 was made for that, also.

Q. But when the child's body was found there was evidence that the child had been bleeding? A. Yes, but—

Q. Just yes, please. Another thing, was there evidence on the child's body of seminal stains? A. Inside the vaginal orifice, yes.

Q. Do you know that Dr. Lukash testified that there was evidence of seminal staining around the orifice as well as within the vagina? A. I didn't hear Dr. Lukash and I couldn't say what he testified to.

526 Q. Was there any evidence of seminal stain on the child's clothing? A. No, sir.

Q. Was there anything about the automobile which would have led you to the impression that it had been cleaned or washed within 24 hours before your inspection? A. Well, I can't say when it was cleaned last. The debris that was present on the rug would disclaim any knowledge of it having been cleaned inside the car. Although the outside, the exterior of the car, was pretty nice.

527 Q. Inspector, isn't it true that your observation of the automobile and what you saw led you to determine that whatever was in the automobile could be of aid to you and the Police Department in establishing either the guilt or innocence of this defendant? A. Well, we figured that the car was part of the evidence in the case that was being investigated and we correlated certain findings in both the car and on the deceased at the autopsy and that led us further in our investigation.

528 Q. My question, Inspector, is merely this: when you looked at the car did you not determine to your own satisfaction that it was in approximately the same condition as it was at or about the time the crime was committed; that it had not been cleaned or changed? A. No, sir, I don't think it was changed.

Q. And yet you found no evidence of blood or seminal stains, is that correct? A. That is correct.

Mr. Goodman: That's all.

Redirect examination by Mr. Cahn:

Q. Inspector Pribyl, just a few questions: do different people have different characteristics in their hair? I mean, different persons, let me put it that way. A. Yes, there are other factors that you can determine. I mean, from looking at a hair you can make determinations sometimes—on a woman's hair where it is affected by permanents and so forth. The use of a dye on the hair can be determined. There are other factors that you enter into in an examination and make other determinations. Sometimes you see a type of hair grease or pomade which was used on the hair, and sometimes you see evidence of dye and things like that which also aid you in concluding that possibly it was not a male's hair but comes from a female, and so forth and so on.

Q. Are there characteristics about a hair by which you can say that since these characteristics are present you know it is not the hair of person A? A. Yes, sir. Where there is positive dissimilarity in the hair the negative is positive. You can say it is not that party's hair at all.

Q. But there is no way of determining positively that one hair is the hair of one particular person? A. That is correct.

Q. All that can be said, as I understand you, is that it is similar in every respect and that there are no dissimilarities? A. That is correct.

Mr. Cahn: That's all.

532 *Nathan Birchall—for People—Direct*

NATHAN BIRCHALL, called as a witness in behalf of the People, first being duly sworn, testified as follows:

The Witness: Nathan Birchall, Port Washington.

Direct examination by Mr. Cahn:

Q. Mr. Birchall, what is your occupation, sir? A. I am an official reporter of the Nassau County
533 Court.

Q. What are your duties as such? A. Take testimony of witnesses and have it transcribed.

Q. When you say take testimony, I assume you mean in shorthand, sir? A. Yes, sir.

Q. How long have you been doing this type of work? A. About fifty years.

Q. On occasion, do you take statements in shorthand and transcribe or cause them to be transcribed for the District Attorney? A. I do.

Q. And on the 14th day of May, 1958, did you at the request of the District Attorney take down
534 in shorthand a conversation between the defendant Willard Phillips and myself? A. Yes, sir.

Q. Did you cause your shorthand notes to be transcribed? A. I did.

Q. And did you compare the transcription with your notes? A. Yes, sir.

Q. And did you find it to be accurate? A. I did.

Q. I show you this, sir, and ask you if that is the transcription. A. It is.

Mr. Cahn: I offer it in evidence.

The Court: Do you want time to read it now?

Mr. Goodman: I probably want time to read it, and about one week to demonstrate that it shouldn't go into evidence.

May I question the witness with respect to it?

The Court: Do you want to do it now or do you want a few minutes for a recess to go over that?

Mr. Goodman: I first would like to ask a couple of questions and then I may ask for a recess. 536

The Court: All right.

By Mr. Goodman:

Q. Mr. Birchall, you and I have known each other I believe for about 25 years, have we not? A. Quite a while. I don't know how long.

Q. So that we both recognize that you have been taking testimony in this County Court for a good number of years; is that correct? A. That's true.

Q. How many confessions from defendants have you transcribed first taken in shorthand and then typed out? A. Well, from the time I started in the Homicide Bureau in the District Attorney's office in New York County— 537

Q. I am speaking, Mr. Birchall, just to the County of Nassau and limiting it to the District Attorney of this county. A. Oh, I have no idea of the exact number, but I say between three and four hundred, maybe.

Q. Were you on this particular instance contacted by some representative of the District At-

torney and advised that you might be called upon to report a confession? A. Well, not in those words. I was called up at my home to hold myself in readiness, that I might be called later to take a statement.

Q. What time were you called? A. I don't remember what time I was called, but I know I left home about 4:15 in the morning.

Q. Can you give us an approximation as to how long before that you were put on notice to be ready? A. I imagine it was about 11 o'clock, but
539 I am not sure.

Q. Is that a pretty fair estimate, Mr. Birchall? A. I think so.

Q. Who was it that contacted you and asked you to be ready? A. Mr. Cahn.

Q. Mr. Cahn? A. Yes.

Q. You are referring to the Assistant District Attorney who is trying this case, is that not so? A. That's true.

Q. This was at about 11 o'clock on the night before you came and finally took testimony, is that right? A. I am not at all sure of the time.

540 Q. Well, just approximately, Mr. Birchall, that's all I want to know. A. I told you the nearest I could come to it, it might have been near 11 o'clock.

Q. Was there anything about yourself personally that would have prevented you from going over to wherever the defendant was at that moment Mr. Cahn called you and transcribed then what the defendant was then saying? A. There wasn't anything to prevent me from going, no. I wasn't asked to go.

Q. In other words, had you been asked, you had the ability to go, is that right, Mr. Birchall? A. As far as I know, I was able to go.

Q. If you had been asked and would have gone, you would have had the ability to take down in shorthand what they were then asking the defendant and what his answers were then; is that right? A. Yes.

Q. But you weren't called into the room until he was ready to confess; isn't that right? A. No, that is not so.

542

Q. What is so, then, Mr. Birchall? A. Because he didn't confess when I first came into the room.

Q. Do you have here transcribed everything that was said from the time you came into the room, Mr. Birchall? A. I have everything that was said in my presence from the time I came in the room until the defendant left the room.

Mr. Goodman: I will now ask for a recess for an opportunity to read this.

The Court: There will be a ten-minute recess. 543

Gentlemen of the jury, do not discuss this case amongst yourselves until you finally deliberate in the jury room at the end of this case.

(A recess was thereupon taken.)

(After recess.)

Mr. Goodman: If I recall, there is now before the Court the offer in evidence by the People of

544 *Colloquy*

the alleged confession. At this time, if your Honor please, the defendant respectfully objects to the reception in evidence of the confession upon the ground that all of the elements recited in the case of People versus Leyra reported in 302 New York are present in this case so as to indicate that this confession was not freely and voluntarily given.

The Court: Motion denied.

Mr. Goodman: I respectfully except.

The Court: Put it in evidence.

545 (Paper referred to received in evidence and marked People's Exhibit 28.)

Mr. Goodman: No further cross examination of Mr. Birchall.

(Mr. Cahn thereupon read People's Exhibit 28 in evidence to the jury.)

The Court: Are you all finished with the last witness?

Mr. Cahn: Mr. Birchall? Yes.

546 The Court: Gentlemen, we will recess until Monday morning at 10:30.

Do not discuss this case amongst yourselves nor formulate or express an opinion with respect to this trial or these proceedings until you finally retire to the jury room after the Judge's charge. You will refrain from reading any newspaper accounts over the weekend or at anytime, or listening to radio broadcasts if such there be relating to this trial.

All right, gentlemen, 10:30 Monday morning.

(The trial was thereupon adjourned until October 6, 1958.)

Mineola, N. Y., October 6, 1958.

Before:

HON. PAUL J. WIDLITZ,
County Judge,

and a Jury.

(Appearances as before noted.)

(Trial continued.)

(Roll call of Jurors.) 548

DANIEL STARK, called as a witness on behalf of the People, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your name? A. Daniel Stark.

Q. Shield number and squad? A. Shield 68, homicide squad.

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Direct examination by Mr. Cahn:

Q. Detective Stark, how long have you been a member of the Nassau County Police Department? A. Eleven and a half years, sir.

Q. And how long have you been connected with the homicide squad? A. Three and a half years.

Q. On May 13, 1958 did you go to Commercial Avenue in Garden City in this county of Nassau? A. Yes, sir, I did.

Q. About what time did you arrive there? A. At about 4:30.

Q. And was that in the afternoon? A. Yes, sir, it was.

Q. And what did you observe when you arrived there? A. On arrival at the scene I observed the body of a young colored girl.

Q. Will you keep your voice up, Detective Stark, please? A. Yes, sir. She was lying on her back and I noticed that she had all her clothes on with the exception of her underpants. I noticed there was a piece of white cloth in her mouth, that there was a black plastic belt around her neck. I also
551 noticed that her shoes were lying across her legs.

Q. I show you People's Exhibit 15 in evidence and asked you if that is a fair and accurate representation of what you saw at the scene on that day and at that time. A. It is, sir.

Q. Now, what, if anything, did you do when you got there, Detective Stark? A. I made an examination of the scene and of the body and caused several photographs to be taken.

Q. Yes? A. And then after making the examination of the scene and having the photographs taken I observed—the Medical Examiners came
552 to the scene, they looked over the body, and then Inspector Thornton of the Identification Bureau removed the plastic belt from around the girl's neck.

Then on removal of the body from the scene Inspector Pribyl of the Technical Research Laboratory took a sample of the blood that was on an asbestos shingle that had been under the body.

Q. I show you People's Exhibit 20 in evidence and ask you if that is a fair and accurate representation of the blood on the asbestos shingle as you have described it for us. A. Yes, sir, it is.

Q. After that was done what, if anything, did you do, Detective Stark? A. Upon completion of our investigation of the scene I left and went to the third precinct headquarters in Williston Park.

Q. And about what time did you arrive there? A. At approximately 6:30 in the evening.

Q. And what did you do when you got to the third precinct? A. On arrival at the third precinct I went upstairs and spoke with Detective Rofheart of the third squad. He explained what he had done to the present and he showed me a statement that he had obtained from the defendant, Willard Phillips. 554

Q. I show you this People's Exhibit 14 and ask you if that is the statement that you saw? A. Yes, sir, it is.

Q. After that what did you do, if anything, Detective Stark? A. After that at about 7 o'clock I went in and spoke to the defendant, Willard Phillips. I introduced myself, told him that we would like to make several tests. I told him that these would take some time and I said, "If you want something to eat I will send out and get it for you." 555

Shortly after that Inspector Pribyl and Dr. Lukash, the Chief Medical Examiner, came into the room.

Q. Did he want anything to eat at that time? A. No, sir, he did not.

Q. Yes? A. When Dr. Lukash and Inspector Pribyl came in Inspector Pribyl told him that he would have to make the tests and asked him was he willing. He seemed quite hesitant.

Inspector Pribyl asked Dr. Lukash, Detective Rofheart and myself to leave the room. Inspector Pribyl told me that he knew the defendant and felt that he might gain his confidence.

Mr. Goodman: I would move that that be stricken, if your Honor please, as hearsay.

The Court: Was it said to you in front of the defendant?

The Witness: Yes, sir, it was.

The Court: Objection overruled.

The Witness: (Continuing) Detective Rofheart, myself and Dr. Lukash left, leaving Inspector Pribyl alone with the defendant.

Some ten minutes later we went back into the room and at this time the defendant was
557 still hesitant to make the tests. He seemed worried about a solution that Inspector Pribyl said that the penis would be washed with.

At this point Inspector Pribyl asked Detective Rofheart to go out and get a cup, a paper cup. Detective Rofheart left and at that time Inspector Pribyl again explained that there was nothing wrong, that he was not trying to kid him, and he also told him if he would rather have his own doctor or have some advice on the matter he would be entitled to that.

558 About this time Detective Rofheart came in with the paper cup, Inspector Pribyl put some of the saline solution into this cup and drank it. He said, "Now, you can see that I'm not trying to kid you. This will not harm you."

Then the defendant said all right and he did all the tests to be made. Upon completion of these tests it was nearing 8 o'clock and—

Q. Keep your voice up, Detective Stark. There is a din outside and it is difficult to hear you.

A. I'm sorry, sir. At about 8 o'clock I decided it was time that I go to eat, I told the defendant that I was going to eat and I asked him if I could bring him anything back. He said no, there was not.

I left the room then, I left Detective Rofheart in the room with the defendant, and I went to eat. I returned to the station house at about 9 o'clock in the evening and at this time I learned that Mrs. Graham, the mother of the deceased, was present. I went into the clerk's office on the lower floor and spoke to her. 560

Q. How long did you speak to Mrs. Graham? A. Between two and two and a half hours, sir.

Q. Who was with the defendant at this time? A. I don't know. I had left him with Detective Rofheart.

Now, when I was finished speaking to Mrs. Graham I went up and asked the defendant if he would like to speak to Mrs. Graham, and he said yes. Mrs. Graham was brought upstairs and allowed to speak with him in a room by themselves.

Q. Was there anything mentioned by you at 561 that time about food tor the defendant? A. Yes, I asked the defendant again if he wanted anything to eat and he again said no, he didn't feel like eating at that time.

Q. How long did Mrs. Graham stay there with the defendant? A. About fifteen minutes, sir.

Q. And was anybody in the room with Mrs. Graham and the defendant at the time? A. No, sir, there was not.

Q. Was the door to the room open or closed? A. It was left ajar so that we could watch in there.

Q. Now, after Mrs. Graham came out of the room of the defendant what took place then? A. I went in to the defendant and I asked him if there was anything that he could tell me now. He said no.

I then went downstairs and spoke to Curtis Maddox, the uncle of the deceased. I spoke to him for quite a while attempting to get a little more background, and then I asked the defendant if he would like to speak to Curtis Maddox and he said yes. Curtis Maddox was again allowed—
563 or, Curtis Maddox was allowed to talk to the defendant at that time.

Q. About what time was this, Detective Stark? A. This was about quarter after one in the morning, sir.

Q. And how long did Mr. Maddox stay there with the defendant? A. About fifteen or twenty minutes.

Q. And was he in the room alone with him? A. Yes, sir, but the door at this time was also left ajar.

Q. And, now, after Mr. Maddox spoke to the
564 defendant, what happened, if anything? A. After Mr. Maddox left the defendant, myself and Lieutenant Cummings went into the room. Detective Rofheart left at this time. And we spoke with the defendant.

We told him that we wanted to go over the entire story as he had given it before. We told him that this would take some time. We asked him if he wanted to eat, if he wanted a cup of coffee, and he said no. We went over the complete story with him and it remained approximately the same as he had given Detective Rofheart.

565

Q. And what time did you start questioning the defendant at this time? A. Roughly at 1:30 in the morning.

Q. And how long did you question him? A. Until about 2:30.

Q. And then what happened, Detective Stark? A. At 2:30 I left the room and went into Lieutenant Curran's office and there I spoke to Lieutenant Curran and Inspector Lada.

I told them what we had learned up to that time and Inspector Lada made a phone call to Police Headquarters in Mineola. On completion of his phone call he told us that we would take the defendant to Police Headquarters in Mineola.

566

Q. And did you go to Mineola? A. Yes, sir, I did.

Q. With the defendant? A. Yes, sir.

Q. And about what time did you arrive at Mineola? A. It was shortly after 3 o'clock in the morning, sir.

Q. And where did you go, Detective Stark? A. We went directly to Chief Pinnell's office.

Q. And what took place in Chief Pinnell's office? A. In Chief Pinnell's office the first thing we did was send out for coffee and sandwiches for everybody, including the defendant. Coffee and a sandwich were brought in to him and he was told he could eat it, but he didn't.

567

Then a short while later while Inspector Lada, Lieutenant Cummings and myself were present, Chief Pinnell went over the entire story with the defendant.

Q. And how long did this take? A. Just about an hour, sir.

Q. And was there any change in the story that he had given to Detective Rofheart and yourself? A. No, sir, there was not.

Q. This would bring us to approximately 4:30, I imagine, Detective Stark. A. That's right, sir.

Q. What happened, if anything, after that? A. Well, on completion of Chief Pinell's questioning of the defendant Chief Pinnell, Inspector Lada and Lieutenant Cummings walked out and spoke with you, Mr. Cahn.

Q. You remained with the defendant? A. I did, sir.

Q. And then what happened? A. Well, a little while later you, Mr. Cahn, Mr. Lockman, Lieutenant Curran and the stenographer, Nat Birchall, went into the room and spoke with the defendant.

569

Q. Did you remain? A. No, sir, I did not.

Q. About what time was this? A. About 5 o'clock in the morning.

Q. And then what happened? A. Well, about a half hour later the door opened and the Chief Inspector, Inspector Lada, Lieutenant Cummings and myself were asked to come into the room.

When we did go into the room the defendant, who was sitting down, stood up and shook hands with us. Inspector Lada at that time asked him,

570 "Willard, are you telling the truth?" And he said yes. And Inspector Lada said, "You're doing the right thing. Do you want a cup of coffee?" And with that we left the room.

Q. Then what happened, if anything? A. Well, some time later the door opened again and you came back, Mr. Cahn, and told us that the defendant had given you a complete statement.

Q. And what did you do, if anything, at that time? A. I took the defendant to the homicide office and there I took a narrative type statement from him.

Q. And did he sign it? A. Yes, sir, he read and signed it in my presence.

Q. Did you—well, I show you this statement, Detective Stark, and ask you if that is the statement the defendant made and is that his signature? A. Yes, sir, it is.

Mr. Cahn: I offer it in evidence.

Mr. Goodman: The defendant respectfully objects to the reception in evidence of this alleged statement upon the ground that the facts already in evidence clearly demonstrate that it was not freely and voluntarily given.

The Court: Motion denied. Put it in evi- 572
dence.

Mr. Goodman: Respectfully except.

(Paper referred to received in evidence and marked People's Exhibit 29.)

(Mr. Cahn thereupon read People's Exhibit 29 in evidence to the jury.)

By Mr. Cahn:

Q. Now, after you took the statement from the defendant, Det. Stark, what took place? A. Upon completion of the statement the defendant asked 573
me if he could see a priest. Arrangements were made and Father John Cochran of Corpus Christi Church in Mineola came to police headquarters and spoke to the defendant.

Q. About what time did he arrive, do you know? A. Sometime after 7 o'clock, sir.

Q. Then what happened? A. After that the defendant was taken over to the identification division where he was fingerprinted and photographed and was placed in detention to await arraignment.

Q. Did the defendant speak with the priest? A. Yes, he did.

574 *Daniel Stark—for People—Direct*

Q. Alone? A. Yes.

Q. About what time was he arraigned? A. He was arraigned at 10 o'clock in the morning, sir, in the First District Court.

Q. After that, sir, what happened, if anything? A. After the arraignment we asked the defendant if he could show us the various locations that this thing took place at and he said yes. We took him in the car, Lieutenant Cummings and myself and Det. Rofheart in one car, and Chief Pinell and Inspector Lada followed us in another car.

575 He took us to Hempstead to Cruikshank Avenue and there, in front of No. 86 Cruikshank Avenue, he said was the spot where he had picked up Sunday Graham.

He then drove us on to Greenwich Street where he pointed out the spot where he stopped and bought ice cream; then drove on down onto Babylon Turnpike, and at the exit for the Meadowbrook Causeway and Babylon Turnpike he said that was the spot in which the rape and killing took place.

He then took us back and finally wound up in the
576 rear of Public Builders warehouse at No. 5 Commercial Avenue, Garden City. He said this is the spot at which he dropped the body of Sunday Graham.

During the ride we had asked the defendant about books or anything else that Sunday might have had with her, and he told us that she had no books. The only thing that she had was a pocketbook.

Q. Det. Stark, up until that time did you know of any pocketbook that Sunday Graham had? A. No, sir, I did not.

Q. Did any of the detectives know of a pocketbook that Sunday Graham had? A. No, sir.

Q. All right. A. While we were present at the scene in the rear of the warehouse, the defendant told me that he had thrown her pocketbook in a generally northerly direction. I went in the direction that he told me, and about 40 feet away from where he was standing, across the railroad tracks, I found the pocketbook.

Q. I show you People's Exhibit 7 for Identification and ask you if that is the pocketbook which you found. A. Yes, sir, it is.

Mr. Cahn: I offer it in evidence. 578

Mr. Goodman: May I have a voir dire?

The Court: Yes.

By Mr. Goodman:

Q. Det. Stark, do you know whether or not the laboratory of the police department was called upon to in any way inspect this pocketbook or its contents? A. The identification division was called on to check it for a latent fingerprint.

Q. Do you know whether or not such a check was made by the department? A. It was, sir, with 579 negative results.

Q. Do you know whether or not upon the discovery of this pocketbook this little pencil and erasure and paper in the plastic pockets were in it? A. It is as it was found, sir.

Q. Do you know whether or not the laboratory made fingerprint inspections of those items to which I have just referred? A. No, sir, I do not.

Q. Is it then your testimony that as far as the police department of this county is concerned, no fingerprints either of the defendant or the victim

were found either on this pocketbook or any of the contents? A. That's right, sir.

Q. Can you tell me, Detective, whether or not there is anything about this pocketbook which in any way identifies its manufacturer or its model? A. Not to my knowledge, sir.

Q. Will you agree with me, Detective, that that is a common type object—it could be bought in practically any department store? A. Yes, sir, I will.

581 Mr. Goodman: I object, if your Honor please, upon the ground of remoteness.

The Court: Overruled.

Mr. Goodman: I respectfully except.

The Court: Put it in evidence.

(People's Exhibit 7 for Identification now marked in evidence.)

By Mr. Cahn:

Q. Now, Det. Stark, did the defendant identify this for you in any way? A. He identified that as
582 the pocketbook that he had thrown, yes, sir.

Q. And did he do anything with it in so far as initials are concerned? A. Yes, sir, he did. He placed his initials on it.

Q. And are the initials WHP the initials to which you refer? A. Yes, sir.

Mr. Cahn: I have no further questions.

Cross-examination by Mr. Goodman:

Q. Detective, is it true that when you were called into this case as a representative of the

homicide squad you became in charge? A. Technically, yes.

Q. So that you superseded Det. Rofheart who had initiated the investigation? Is that correct? A. Yes, sir.

Q. As I recall your testimony, you appeared at the precinct in which the defendant was being held at or about 6:30 p. m.? A. That's correct, sir.

Q. At that time you technically were in charge of the case, were you not? A. Yes, sir.

Q. At that time you were advised, were you not, by Det. Rofheart that the defendant had been held by him if not technically under arrest at least under his control since about 11 o'clock that morning; is that correct? A. I was informed that the defendant had been at the station house since a quarter after 1 in the afternoon, sir. 584

Q. Were you ever apprized of the fact or the approximate time at which the defendant got in custody or control of the police department that day? A. I was told that Det. Rofheart was present at his home somewhere in the vicinity of 11:30 in the morning, sir.

Q. Were you also advised that from the time that Det. Rofheart saw the defendant at his home he had him under control of one sort or another until the time when you got there? A. I knew that he was at the Third Precinct station house from that time, yes, sir. 585

Q. You knew that Det. Rofheart had procured from the defendant a statement, the one that was in evidence and exhibited to you? Is that right? A. Yes, sir.

Q. Is it not true that that statement completely exonerated the defendant of any implication in this crime? A. As far as that statement is concerned?

Q. As far as that statement is concerned, yes, sir. A. Yes, sir.

Q. So that based upon that statement and that alone the police department had no right to have the defendant under control and in its custody; isn't that correct?

Mr. Cahn: I object to the form of the question.

The Court: Sustained.

587 Q. You knew at that time, did you not, Det. Stark, that the child's body had been found? A. Yes, sir, I did.

Q. You were advised and had enough information, did you not, to know that the child had been the victim of a murder? A. Yes, sir.

Q. You had some reason, did you not, to believe that the defendant may have committed that crime, is that correct? A. Yes, sir.

Q. Did you then place the defendant under arrest? A. No, sir.

Q. Did you advise him that he had a right to
588 leave police headquarters since he was not under arrest? A. When I arrived at 6:30 if he had asked to leave I would have placed him under arrest.

Mr. Goodman: If your Honor please, I would respectfully move that the answer be stricken as not responsive, and the witness directed to answer my question.

The Court: Strike it from the record as not responsive, and the jury will disregard it.

Repeat the question.

589

Q. Detective, did you tell the defendant that he then and there had a right to leave police precinct? A. No, sir, I did not.

Q. In your opinion as a police officer experienced in the investigation of crime and in the prosecution of criminal cases, did you believe that you were then in possession of sufficient evidence with which to have this defendant indicted for the crime?

Mr. Cahn: Objection.

The Court: I will take it.

590

A. I felt that we had enough to make further investigation.

Mr. Goodman: I would move, if your Honor please, that that answer be stricken as not responsive and the witness admonished to answer my question.

The Court: I think he has answered it, counsel, but if you want to pursue it—

Mr. Goodman: May I have the question read.

591

(Last question read by stenographer.)

Q. You have now heard the question reread. Can you now give me a yes or no answer? A. No, sir, I can't.

Q. Is it not true that the reason that you kept the defendant in custody from that point forward was because you wished to exact from him a confession as to this crime? A. No, sir.

Q. Can you tell us, Detective, what was your purpose in keeping the man? A. To complete our investigation, sir.

Q. How did you propose to complete your investigation? A. There were several tests that had to be made by the laboratory. There were some discrepancies in his story. All of these had to be straightened out.

Q. What tests do you refer to, Detective? A. Fingernail scrapings, penis washing, examination of the defendant's clothing.

Q. Now, Detective, did there not come a time during the course of that evening when those tests were conducted and the results determined?
593 A. Not until sometime later, sir.

Q. About what time? A. Well, after midnight, sir.

Q. Now, isn't it true that a seminal wash was done to the defendant about 7:30 that evening? A. In that vicinity, yes, sir.

Q. Did not Dr. Lukash advise you that it was negative, there was no evidence of semen on the defendant's privates? A. At that time, no, sir, he did not.

Q. When did he give you the results of that test? A. It was after midnight, sir.

594 Q. Approximately when, Detective? A. I don't honestly know the answer to that. I couldn't give you anything definite on time.

Q. Was it sometime before the defendant was ultimately taken to headquarters? A. No. I believe it must have come about the time he was taken over there.

Q. Were you notified of the results of that seminal wash test after you had arrived at main headquarters or before you left to go there? A. I believe it was after I had got to headquarters that I came to know.

595

Q. Are you familiar with the provisions of Section 165 of the Code of Criminal Procedure? A. No, sir, I am not.

Q. Have you ever heard that there is a rule of law which makes it the obligation of police authorities to arraign a defendant as quickly as possible? A. Yes, sir.

Mr. Cahn: Objection. If you are going to quote law, quote it properly.

The Court: Reword the question. Give the question over again.

596

Q. Is it not true that the provisions of our Code of Criminal Procedure obligate the police department to arraign a defendant within a reasonable time after apprehension? A. Yes, sir.

Q. Do you also know that it is a violation of our penal law if the police department deliberately breaks that provision of the Code of Criminal Procedure? A. Yes, sir.

Q. Do you also know that the law of this state is that the mere desire of the police department to obtain a confession is no legal justification for a delay in the arraignment? A. Yes, sir.

597

Q. How far from the precinct in which the defendant was being held on that evening was a court in which he could have been arraigned in terms of miles? A. You mean the distance from the Third Precinct to the District Court?

Q. Yes, Detective. A. If the court had been open it is a distance of about maybe three miles.

Q. Were you aware that Det. Rofheart had placed the distance at one mile? A. No, sir, I was not.

Q. Did you at any time during the course that you were interrogating the defendant or investigating this case take the trouble to find out whether or not the District Court was open and a Magistrate present? A. No. I know from past experience that the court closes at 4:45.

Mr. Goodman: If your Honor please, I respectfully request that the witness be admonished not to volunteer and to limit his answers to my questions.

599 The Court: Answer the question.

The Witness: I am sorry, sir.

Q. My question, Detective, was, did you take the trouble to find out if there was a Judge sitting over here in the District Court while you were interrogating the defendant? Just yes or no. A. No, sir.

Q. Do you know that every member of the Board of Judges of the District Court of the County of Nassau lives in the County of Nassau? A. No, I didn't know that, sir.

600 Q. Do you know that every member of the Board of Judges of the District Court of the County of Nassau has his home telephone listed in the public directory? A. I didn't know that of my own knowledge, no, sir.

Q. Getting down now to the seminal wash test, Detective, as I understood your testimony a request for the test was made by Inspector Pribyl in your presence, is that correct? A. Yes.

Q. While Dr. Lukash was present, is that right? A. That's right, sir.

Q. And the defendant indicated that he did not wish to submit to that test, is that right? A. That's right, sir.

601

Q. And thereupon Inspector Pribyl suggested that everybody leave the room and that he be left alone with the defendant, is that right? A. That's right, sir.

Q. Did everyone leave the room except Inspector Pribyl and the defendant? A. Yes, sir.

Q. You are sure that there were no other police officers left behind with Inspector Pribyl? A. Yes, sir.

Q. Your answer is yes, you are sure, or yes, there were? A. There were no other police officers, sir.

602

Q. How long did you remain out of the room? A. Approximately ten minutes.

Q. Did you overhear any of the conversation or anything that transpired in the room while you and the others were out of it? A. No, sir, I did not.

Q. Did you ultimately go back into the room of your own volition or were you invited to come back into the room? A. I believe Inspector Pribyl called us back in.

Q. Is that just something that you believe or is that your actual recollection? A. That is my actual recollection, sir.

603

Q. Is it not true that when Inspector Pribyl invited you all back into the room at that time the defendant was perfectly content to submit to the examination? A. No, sir, he still seemed a little hesitant.

Q. And was he told that this was an insignificant test? A. No, I don't recall that.

Q. Do you remember Dr. Lukash saying to the defendant, "This is an insignificant test"? A. No, sir, I don't.

Q. Do you remember Inspector Pribyl saying to him in words or substance, "This is an insignificant test; it can't hurt you"? A. No, sir.

Q. Did anybody tell the defendant that if the results of that test proved positive that that evidence could be held against him? A. No.

Q. But it is true that if it had proven positive that such evidence could have been used in this trial? Isn't that true, Detective? A. Yes, sir, it is.

605 Q. How many officers in all, including yourself, interrogated the defendant from the time that you came into the picture until the time that the defendant spoke to the District Attorney's office? A. Of my own knowledge?

Q. Yes. A. Four or five, sir.

Q. Did Inspector Pinnell interrogate him? A. Yes, sir.

Q. Detective Rofheart? A. Yes.

Q. Captain Lada? A. He was present at Headquarters, sir, when the defendant was questioned by Chief Pinnell.

606 Q. Wasn't he also back in the precinct? A. Yes, sir, he was.

Q. Wasn't there a man by the name of Cummings? A. Yes, sir, Lieutenant Cummings.

Q. Lieutenant Curran? A. Lieutenant Curran was at the third precinct, yes, sir.

Q. Didn't all of these men at one time or another interrogate the defendant? A. Not while I was present, sir.

Q. Have you been informed as to how many police officers in all interrogated the defendant that night and morning? A. No, sir, I have not.

Q. At any time did you either see or hear any other officer say to the defendant, "You better talk. If we don't get it out of you one way we will get it out of you another"? A. No, sir.

Q. Nothing like that? A. No, sir.

Q. Did you at any time during the course of the interrogation strike the defendant? A. I did not.

Q. Did you observe any other officer strike him? A. No, sir.

Q. Did you or any other officer ever indicate to the defendant that you were his friends and that you wanted to help him and that if he cooperated you might help him get off very lightly? A. No, sir. 608

Q. From the time that you saw the defendant first that evening until he was left with the District Attorney did you see him have one thing to eat? A. No, sir, I did not.

Q. Did you see him have one drink of water? A. I did not, no, sir.

Q. Of your own knowledge when did the District Attorney—and I am referring to Assistant District Attorney Cahn—first arrive in Police Headquarters that morning? A. I don't know, sir. I think it was—no, I don't honestly know, sir. 609

Q. Now, to refresh your recollection, Detective, isn't it true that the defendant was brought to Headquarters and that the Assistant District Attorney was already at Headquarters waiting for him? A. I didn't see him, sir.

Q. Well, had you been told that such was the case? A. Yes, yes.

Q. So that it was your information that the defendant was to be brought to County Head-

quarters with knowledge that the Assista
District Attorney was in the main Headquarte
on the same case, is that right? A. That's rig
Q. What time did you arrive at the main Hea
quarters that night? A. Shortly after 3 o'clo
in the morning, sir.
Q. At what time did Assistant District Atto
ney William Cahn first speak to the defendan
A. It would be a little bit after 5 in the mornin
sir.
611 Q. So that for more than two hours—is th
not true, Detective—the police continued to inte
rogate the defendant while Assistant Distri
Attorney William Cahn didn't even enter t
room to see what was going on? A. No, sir, th
is not completely true.
Q. Will you tell us what is true? A. He w
questioned only for an hour at Headquarters.
Q. Detective Stark, didn't you just tell us th
you arrived at Headquarters at approximate
3 o'clock that morning? A. Yes, sir, I did.
Q. And doesn't the statement which is alread
in evidence indicate that Assistant District Atto
612 ney William Cahn did not commence his inte
rogation until 5:30 that morning?

Mr. Cahn: No.
Mr. Goodman: Well, let us have it rig
Mr. Cahn: 10 after 5.

Q. 5:10, is that true? A. Yes.
Q. So that it was for two hours and ten minut
the Assistant District Attorney waited out
the room while the police were interrogating t
defendant, isn't that true? A. For about
hour we interrogated him, yes, sir.

Q. Will you tell us what happened to the other hour and ten minutes, Detective? A. That was taken up in the time that we explained the case to Mr. Cahn. It was taken up while we ate.

Q. Wasn't there always another officer talking to the defendant during that entire period of time? A. No, sir.

Q. He was just permitted to sit there and nobody spoke to him, is that it? A. There was quite a bit of time that he just sat there while no one talked to him, yes. 614

Q. Do you recall when you first entered Headquarters that night that Inspector Pinnell said to the defendant, "D.A.'s in the next room. This is your last chance to talk, boy. Get smart." Something along those lines? A. No, sir.

Q. Did you hear Inspector Pinnell say to the defendant, "Well, you needn't be completely despaired. These charges don't always carry the extreme penalty." A. No, I did not.

Q. He didn't say that? A. No, sir.

Q. Do you deny he said it or merely that you didn't hear him say it? A. I didn't hear him say it. 615

Q. Did you hear Inspector Pinnell or anyone say to the defendant, "Cooperate with us and we will get help for you. You need help." A. No, sir.

Q. Did you see Inspector Pinnell lose his temper, get up from behind his desk, go around and knock the defendant off the chair on which he was seated, and say, "Talk, you black bastard"? A. No, sir, I did not.

Q. Did you see any officers walk behind the defendant while he was seated in his chair and strike him behind his neck with the side of their hands? A. No, sir, I did not.

Q. You didn't see that happen? A. No, sir.

Q. Did you see Inspector Pinnell get up from his chair and say to the defendant, "I'm going out and talk to the D.A. This is your last chance." A. No, sir.

Q. At any time while the defendant was under your observation did you see his head fall forward as if he was dozing off? A. No.

Q. At any time did you see anything about the defendant which indicated that he was sleepy?
617 A. He might have yawned. I don't honestly recall.

Q. Did you ever see any officer snap his head back and say, "Keep awake, boy, and talk"? A. No, sir, I did not.

Q. When Assistant District Attorney William Cahn came into the room to commence his interrogation he had Mr. Birchall, seated right in front of you, with him, is that right? A. That's right, sir.

Q. Mr. Birchall is the court stenographer for the County Court of Nassau County, is he not? A. He is.

618 Q. And you know, do you not, that the interrogation by Assistant District Attorney William Cahn of the defendant was all taken down in shorthand by Mr. Birchall? A. Yes, sir.

Q. Tell me this: did the Police Department consider it important enough to make a record of the questioning of the defendant before Mr. Cahn got into the room? A. I don't follow you, sir.

Mr. Cahn: I object to that.

Mr. Goodman: I will withdraw the question.

619

Q. Do you know, Detective, whether or not the Police Department saw fit or thought it necessary to record or transcribe the questioning of the defendant before Assistant District Attorney Cahn commenced his interrogation? A. No, sir.

Q. So that we have nowhere any record to be read and scrutinized of what was said between the police and the defendant before the District Attorney got to work, isn't that it? A. You have the statement that Detective Rofheart took, sir.

Q. But nothing about the questions that were asked or the answers given by the defendant, isn't that correct? A. Not in question and answer form, no, sir.

620

Mr. Goodman: I have no further questions.

Mr. Cahn: Thank you, Detective Stark.

Mr. Cahn: The People rest.

Mr. Goodman: Do I understand that the People have rested?

Mr. Cahn: Yes.

621

(There was a conference at the bench.)

Mr. Goodman: If your Honor please, the defendant at this time respectfully requests that the jury be excused while a technical discussion takes place among counsel and the Court.

The Court: All right. Gentlemen of the jury, this motion on the defense counsel's part and everyone else's part will probably take another half hour. We can save a little time by directing that you be taken to lunch at this time. We will reconvene at 2 o'clock. I direct the Sheriff to

have the defendant in his cell by quarter of 2 today. We must have him there by 1:45 for the purpose of discussion with the defense counsel.

Gentlemen of the jury, you are not to discuss this case among yourselves or formulate or express an opinion with respect to this trial or proceeding until you retire to your jury room for deliberation after the Court's charge. You will refrain from reading any newspaper articles of any sort throughout the trial or listening to any raido broadcasts, if such there be, during the
623 continuation of this trial.

There will be a five-minute recess and then I will hear the motions.

(A short recess was thereupon taken.)

(After recess)

(The following occurred in the absence of the jury):

624 Mr. Goodman: If your Honor please, the defendant respectfully requests permission of the Court to direct its initial motion to the second count of this indictment by which it is charged that the defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, willfully and feloniously and of malice aforethought killed one Sunday Graham by causing her to suffocate and by choking her with a belt, this, of course, as your Honor well knows, being the old common law count of murder.

I should like to say by way of preface, if the Court please, that the mere existence of some

facts in a case does not therefore ipso facto render it obligatory that the Court must refer the matter to the jury as a question of fact. That if the weight of the evidence is such that the Court would be obliged to set aside as against the weight of the evidence any verdict contrary to that which is apparent to the Court, then we no longer have any case of a question of fact, but rather a question of law, in which event it is the obligation of the Court to so rule to determine and keep the case away from the jury.

626 And so it is that I contend on behalf of the defendant that such exists with respect to the second count of this instant indictment.

It is set forth that premeditation, which is, of course, contemplated by this count of the indictment, is the thought process in advance by which a person who perpetrates the act forms the purpose or the plan to kill. It is also said under our law that deliberation is the thought process prior to the act by which the defendant makes his choice as to whether to embark upon his plan or not.

627 It has been clearly held by our courts that to warrant a conviction of common law murder in this state proof beyond a reasonable doubt that the homicide was committed by the accused from a deliberate and premeditated design to effect the death of the victim is necessary, neither element alone being sufficient. And such deliberate and premeditated intention must precede the killing by some appreciable space of time, long enough at least for some reflection and consideration or choice to kill or not to kill.

Now, if your Honor please, I would ask that you review with me the basis upon which the pros-

ecution contends that this was a case beyond a reasonable doubt that this defendant with premeditation and deliberation—

The Court: Is that People against Majone that you were citing from?

Mr. Goodman: Your Honor embarrasses me. My astute associate has the citation. We will let you have that in just a moment.

How does the District Attorney wish to pin upon this defendant the charge and a conviction of a premeditated and a deliberate murder? If
629 we review the District Attorney's opening, and I believe the law is clear that the People are limited in their proof to that which is within the purview of the opening, then we find that Mr. Cahn makes the following observations and accusations:

No. 1, that there was a threat; No. 2, that the motive was that of revenge, a suitor spurned; No. 3, the use or the forcing of the panties into the mouth of the poor child; and No. 4 and finally, the use of the belt.

Let us first review item No. 1, the threat. And I think that I should review it in combination with
630 item No. 2, the motive.

Upon the witness stand there came in this case, if your Honor please, a distraught, thoroughly upset woman, the mother of this poor child. She had lived a most harrowing life with this defendant. Certainly she could feel no appeal of mercy or compassion in her heart. It is understandable that there would be a desire on her part that this man who brought her this terrible tragedy be destroyed.

As far as her ability to tell the truth or her inclination to tell the truth, I must with reluctance, if your Honor please, challenge the character of

that lady. I think that her life history as she herself admitted it upon the witness stand under oath, clearly demonstrates that this is not a woman upon whose word we can place too much faith.

For the last several years she has lived a life of lies as far as her husband is concerned in concealing her illicit relationship with this defendant. In her employment in Great Neck she was deceiving and deluding her employers about this defendant, all of which clearly demonstrates, if your Honor please, that this woman has no great 632 regard for the truth and morality.

So that I do not think that too much weight, and certainly not enough to put this man in the electric chair, should be assigned to that woman's testimony.

That she said to him, "I am through. Get out of my life," and that he responded, "If I go I won't go alone—" this is what the District Attorney wishes the Court and the jury to predicate a finding of premeditated murder upon.

But let us go a step further, if your Honor please, and analyze the evidence as it came from her own lips, to determine whether in truth and 633 in fact such a conversation did take place on the Thursday night before this horrible event. She would have you believe that she went to this man's room and there told him, "Get out of my life," and his response was, "I won't go alone." This was supposed to end a romance that was distasteful to her and yet, strangely enough, if your Honor please, she sees the defendant on the following Saturday, and no matter how she tries to cover it she had to admit that she made a date to see him again that very same night.

634 *Motion for Dismissal of Second Count*

So, if your Honor please, I think that too much credence cannot be given to this story that she told him to get out of her life, that it was because of this that he had it in mind or formed the intent to commit this horrible crime upon that poor innocent little girl.

And let us go just a little further in reviewing, if your Honor please, how much weight can be given to this threat. She admitted that her relationship with this defendant started back at a time when she was about 14 or 15 years of age, and
635 that she left him because of his misconduct so many times she couldn't count them. She divorced him, if your Honor please. Now, if ever a woman lets a man know she doesn't want him, it is when she gets a divorce. And notwithstanding the innumerable times in which she left him and notwithstanding the divorce, he never committed an act of violence upon her. And she saw fit to go back and resume her relationship with him on all of these innumerable occasions.

But now she would have the Court and the jury believe that on this occasion the effect of her de-
636 sire to leave him was so strong that he then and there determined in his own mind to kill this poor little child. I submit, if your Honor please, this is not the sort of thing upon which any court can predicate a finding of premeditated murder.

Let us now, if your Honor please, go to the prosecution's point 2 on premeditation, the belt. The statements so carefully gotten on two occasions from the defendant speak of how tightly wrapped around the neck of this poor child was that belt. Inference upon inference is forced from Mr. Cahn's lips into the minds and lips of the

defendant while he is confessing that he put that belt around the child's neck with the intent and the desire to kill, and if your Honor will recall the defendant's response was, "Mr. Cahn, if that is the interpretation you are going to put on it, I guess maybe it was." Never an admission that he in fact actually did it!

But the important thing, if your Honor please, is a consideration of the physical facts. Dr. Lukash, the County Medical Examiner, got upon that witness stand and testified—and I don't know how pleasing it was to the People or not—but his 638 testimony was clear and without question that the belt was loosely around the neck of the child. There was barely any evidence of the act that it had been there. That in no way did the fastening of that belt around the neck of the child contribute to or cause the child's death.

So I submit you can throw that out, the belt. We are left with but one thing, if the Court please, upon which anybody can predicate a contention that this man premeditated this crime. And that is the stuffing of the pants into her mouth. 639

Where in this case other than the fact that the panties were there is there the slightest evidence to indicate that this man took those panties in his hands and had enough time to say to himself, I want to kill this child or I don't, and then after he made up his mind, to put the pants in the child's mouth?

If your Honor please, this was a crime of passion, a horrible, horrible crime of passion, committed by a desperate and frantic, panic-stricken animal, if your Honor please, who never had a chance, who was incapable because of the fact that

he was consumed with lust and passion to design or intend to destroy this child, to kill her. The use of the pants was for the reason indicated in his admission, his confession. The screams of the child were driving him frantic and he simply wanted to stifle those screams. There never was an intent or design that the use of those pants, no matter how forcibly they were in fact used, was for the purpose of bringing about the end of this child's life.

641 I submit, if your Honor please, that the evidence so far preponderates in the direction of a lack of proof of premeditation in so far as this defendant is concerned, that as a matter of law it is the obligation of this court—and I say this most respectfully—to dismiss the second count of this indictment.

The Court: Decision reserved until 2 o'clock.

Mr. Goodman: I have another motion.

The Court: Go ahead and make it.

Mr. Goodman: I now address a motion to dismiss the entire indictment, if your Honor please, upon the ground that the People have failed to

642 establish beyond a reasonable doubt, as required by law, and that they have failed to sustain their burden of proof of the guilt of this defendant of both of the crimes charged in the indictment. And I predicate that claim, if the Court please, upon the fact that the only conclusive proof of the guilt of this defendant of the crime of which he stands charged is the confession. I submit, if your Honor please, that in the absence of that confession there would be no question in my mind that your Honor would summarily dismiss the indictment on the People's proof and on the motions addressed to the Court by the defendant.

I would ask that you review all of the evidence in this case to see if there is any proof of the guilt of this defendant of the crime with which he stands charged, absenting the confession. Let us examine each of the witnesses in this case and their testimony.

I feel that I have already thoroughly reviewed with your Honor the testimony of the mother, Mynita Graham. I will now pass over the question of the corpus delicti, because there is no dispute that the child was murdered, her body found, and that she had been raped, and I come now to the 644 first witness whose testimony is important as from the point of view of the guilt of this defendant, and I refer to that very lovely little child, Kathleen Mullen.

This, of course, was the attempt of the District Attorney to tie the defendant with the victim. I would first like, if your Honor please, to ask you to take into consideration a most pertinent fact, and that is this: that nowhere during the course of this trial has the prosecution established the hour of the death of the victim so that we at this time have no knowledge at all as to whether or not 645 she had been killed an hour, or two, or three or four or more before her poor body was discovered. All we do know is from the County Medical Examiner that rigor mortis had set in, but no hour of death fixed by anyone.

Kathy Mullen saw Sunday Graham for the last time at 3 o'clock, I believe, on May 12th. The child's body was not discovered for more than 24 hours thereafter. So even asuming that we give the most complete of credence to the testimony of Kathy Mullen, in that it was actually the defendant and the defendant's car in which Sun-

day Graham ran to that fatal afternoon, we still have no proof as to what occurred in the intervening 24 hours, and very conceivably and not inconsistent with innocence that he might very well have taken the child in his car and let her go about her way, and someone else committed this terrible crime. So that from that point of view very little if any significance can be assigned to the testimony of Kathy Mullen; but I go a step further, if your Honor please, and I ask your Honor to use or rather to take advantage of the
647 vast experience that your Honor has had both as a trial lawyer and as a sitting Judge and recognize facts as reality.

We have here in Kathy Mullen a splendid and sweet child who would lie for no one, but she is an impressionable youngster, if your Honor please, a school student. Any normal child of that age can very easily be led in a direction by someone a little bit mature, and I ask your Honor to recall that the child admitted that the detectives literally led her by her hand, took her to an automobile and said, "Kathy, doesn't this look like the auto-
648 mobile into which you saw Sunday go that afternoon?" And, the child's answer was a flat, unadulterated, unequivocable yes. And, when I said to the child, "Isn't it true, Kathy, that the officers held up before you this white cap and said 'Kathy, doesn't this look like the cap that you saw the man that afternoon wearing?' " and the child's answer again was yes; and the same with respect to the jacket. And then consider that there was nothing unique in the appearance of the automobile, the cap or the jacket, and consider that there is nothing unique about a negro operating an automobile; and consider further that this

child by her own admission was at least 150 feet away from this automobile at the moment that she was operating her bicycle over admittedly a rough area where she had to look ahead to be sure she wouldn't fall, and your Honor can readily understand that we can't pin any evidence worthy of salt of guilt of this defendant on the testimony of Kathy Mullen.

The next evidence, if your Honor please, of the defendant's guilt is the automobile, the fingerprint. The People have produced in evidence undisputedly a fingerprint of the victim on one of the 650
no-draft windows of the automobile. I made no attempt to dispute the fact that it was the child's fingerprint, but I think that the importance of that testimony, if ever it was important, completely evaporated when it was established that the child had ridden in the car on occasions before and the officer was unable to say whether or not that print was placed there or reached that point on the day in question or at some time earlier.

So, as far as the print is concerned, I am sure that we would recognize no evidence upon which we can find any conviction of guilt. 651

Let us consider the testimony of Dr. Lukash and see how if at all this fixes guilt upon this defendant. The seminal wash, negative; scrapings under the fingernail for blood or skin, negative; and now let us go to Inspector Pribyl. He finds some underwear in the man's room. No proof as to when the man wore it and he finds two stains, one on the T shirt and one the fly of the shorts, and all he can tell us is that it is blood. He can't say whether it is human blood or whether it is animal blood. He can't tell us when it got there. He can't certainly identify the blood grouping. So

I submit, if your Honor please, that is out the window. No value whatsoever.

In the automobile the police department finds some peanut shells and they find one hair which they say was that of a negro. On the child's body they find two pubic hairs which they also say were those of a negro; and very important, if your Honor please, at the scene of the crime under the child's body they find evidence of copious bleeding. The photograph in evidence clearly demonstrates
653 that this child was actually bleeding to a very noticeable degree at the time that her body was deposited there. And, in addition, evidence that there had been penetration and the deposit of semen.

We take the peanut shells, and Inspector Pribyl has to admit that he couldn't possibly connect the peanut shells in the back of that automobile with those on the head of the child. We go to the hair which he found in the automobile. He cannot tell us the individual from whose head that hair came. As a matter of fact, he can't tell us the sex or the age of the individual from whose head that
654 hair came, and he can't tell us what day of the week or what month that hair or those peanut shells got into that automobile. And as far as the pubic hairs are concerned, the same thing. He couldn't possibly give us the identity or the sex of the individual from whom those two pubic hairs came, But, the most important thing, if your Honor please, in this case as far as the People are concerned is predicated upon their contention that the rape, the murder took place in the car, and that the child's body was transported for some distance of miles and time before it was deposited there on Commercial Street. Yet, when I asked Inspector Pribyl "Did you make a thorough and intensive

examination and inspection of that automobile," his answer was yes.

"Did you find any evidence that it had been cleaned from the time the crime was committed until the time that you made the inspection?" and his answer was no.

"Have you told us everything that you found? and his answer was "Yes, I only found the fingerprint, I only found the hair and I only found the peanut shells." And, when I said to him, "Are you sure?" he knew what my question was going to be so he tried to steal my thunder. He said, 656
yes, there was no blood and no seminal stain in the car.

Now, if your Honor please, I submit that there the People have demonstrated a lack of proof of the guilt of this defendant, and there I say, if your Honor please, constitutes the evidence adduced by the People as far as the guilt of this man is concerned, and they rested completely upon the confession.

Now, I am not going to belabor that situation, if the Court pleases. I would respectfully ask that your Honor merely take another case, People 657
versus Leyra, which I know you have looked at most thoroughly and most recently, and you will find that practically every one of the items contemplated by that decision applying in this case. Concededly, if you take them one by one each item in and of itself does not constitute enough as a matter of law to knock out the confession, but under the authority of People against Leyra in combination you spell out the fact that this was not a free and voluntary confession.

I ask you to take into consideration, if your Honor please, that it was a period of almost 20

658 *Motion to Dismiss Indictment*

solid continuous hours during which this man was grilled before he finally broke down as a result of a deception practiced upon him by the District Attorney in confessing the crime. That is Item No. 1. I admit that standing of itself that isn't enough.

The Court: No issue of fact either presented.

Mr. Goodman: I am sorry?

The Court: I don't see any issue of fact presented of what we have so far on the question of the confession.

659 Mr. Goodman: I submit, if your Honor please, from the People's case these items which I am now reviewing were developed.

The Court: Counsel, that isn't established in the People against Leyra. I am willing to discuss it during the interval. Right now I am of the opinion there is no issue of fact raised by any of the evidence as to whether this confession was given under undue threats. That is, I am telling you how I stand now in my own mind, right now, on the law. If you want to fortify yourself between the time the case goes on until the time the

660 jury gets it, I will be glad to talk to you about it.

Mr. Goodman: May I continue?

The Court: Yes.

Mr. Goodman: I submit, number one, the 20 hours of constant, intensive interrogation and grilling. Item No. 2, the fact that this man was not fed, that he was not permitted to sleep. I place great emphasis upon the fact that he was never advised that he had no obligation to remain in custody, that he had no obligation to speak, and that he was never told that anything he might say would be held against him, and that if he submitted to that seminal wash test, the evidence that might be adduced from that test would be held against

him, and, I place particularly great emphasis upon the fact, if your Honor please, that after he had been in custody for some five or six hours and after he had given the statement which in effect exonerated him so that they had no evidence to implicate him, Det. Rofheart admitted under cross-examination even though Stark belatedly comes in a day or two later to contradict it, and Rofheart stated "The only reason we kept him in custody even though we didn't have a thing on him was because we wanted to exact a confession from him." 662

And I submit that that item in combination with all of the other items which I have raised together constitutes sufficient set of facts for your Honor to rule as a matter of law that this confession was not freely and voluntarily given; and upon that I renew my motion for a dismissal of the entire indictment.

The Court: I will reserve decision until 2 o'clock.

Mr. Goodman: Thank you.

Mr. Cahn: May I make one observation for the record, your Honor. It seems a bit ridiculous to 663 me to attempt to be on both sides of the fence at the same time. Here in one breath Mr. Goodman is yelling that we cannot tell the defendant that the results of the seminal test would be held against him, and now he comes into court and offers it as proof of the defendant's innocence since no seminal stain was found on the defendant's penis. I don't think you can be on both sides of the fence at the same time.

The Court: All right. Let's not get into a hassle about it. We have everything on the record. Decision reserved until 2 o'clock.

(Luncheon recess was thereupon taken.)

AFTERNOON SESSION.

(The following occurred in the absence of the jury):

The Court: With respect to both motions to dismiss, by the defendant, both motions are denied.

Mr. Goodman: The defendant respectfully excepts, if your Honor please.

(There was a conference at the bench.)

The Court: With the permission of the Court the psychiatrists are not ruled out of court under the overall direction.

Mr. Goodman: For the record, if your Honor please, I would advise the Court that there is now seated at the table of counsel for the defense Dr. Harold Zolan, who may be called as a defendant's witness, and the defense has no objection if the other doctor for the prosecution assumes a place at the prosecution's table.

(The jury entered the courtroom.)

Mr. Goodman: Mr. Phillips, take the stand, please.

WILLARD H. PHILLIPS, the defendant, called as a witness in his own behalf, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Willard H. Phillips.

Q. Where do you live? A. 38 Garfield Place, Hempstead.

Direct examination by Mr. Goodman:

Q. Mr. Phillips, are you the defendant in this matter? A. Yes, sir.

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Q. Now, please speak up so that Mr. Gatteau back here can hear you. Do you know that the Court has appointed myself and Mr. Benoit to represent you in this prosecution against yourself? A. Yes, sir.

Q. Have you discussed this case and your entire life history with myself and Mr. Benoit? A. Yes, sir.

Q. How frequently did you speak with him and me about this case? A. Well, on possibly five or six occasions.

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Q. And did you tell us in complete detail all that you knew about yourself and about the case? A. Yes, sir.

Q. In addition to us did you speak to anyone else at our request and direction? A. Yes, sir, I did, sir.

Q. Do you recognize the gentleman seated at the defense table? A. Dr. Zolan, yes, sir.

Q. Have you talked to Dr. Zolan about this whole matter and about yourself? A. Yes, sir.

Q. How frequently did you speak with him? A. Three or four different occasions or thereabouts.

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Q. And did you go into great detail about every aspect of this case that you knew and recalled? A. Yes, sir.

Q. Phillips, when and where were you born? A. I was born in Dublin, Georgia.

Q. When? A. On March 27, 1916.

Q. Do you know whether or not your parents were husband and wife? A. No, I don't know.

Q. As far as you know did you know that your mother was an unmarried woman? A. I don't know that she was married. I have heard conversation contrary to it.

Q. Now, you are going to have to speak up and you are going to have to speak slowly and distinctly, please, Mr. Phillips. A. I said that I didn't know that she was married to my father and I did hear conversations contrary to it.

Q. In any event, did you as a boy live with your mother? A. Only on visits.

Q. Just when you went to visit her, is that right? A. Yes, sir.

Q. With whom did you live, Mr. Phillips? A. My maternal grandmother and stepgrandfather.

Q. And where was that? A. In Dublin, Georgia.

Q. How long did you live with them? A. Well, continuously from birth until I was past 15 years old.

Q. Were there any other children living in that house besides yourself? A. No, sir.

Q. Do you know whether or not at any time while you lived with your grandparents they raised any other children besides you? A. Well, I had uncles, my mother's younger brothers. The youngest was approximately 12 years older than myself.

Q. And was that child raised in the same house as you were, by your grandparents? A. The younger one was, yes.

Q. Did your grandparents treat you in a way that you regarded as proper? A. Well, they did to the best they knew how.

Q. Were you hapyy with them? A. Yes.

Q. Did you discuss your childhood with Dr. Zolan? A. Yes, sir.

Q. Did you tell him that you were not happy and that you felt that your grandparents were abusing you?

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Mr. Cahn: I object as to the leading type of question that counsel is now asking. This is his own witness.

The Court: I will permit this.

Mr. Goodman: For the sake of expedition, if your Honor please, I think it most important at this point that everyone recognize one thing, and that is my obligation to spell out during the course of this man's testimony inconsistencies of his to myself or to the doctor in order for the jury to determine what, if anything—

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The Court: Counsel, I am permitting you to proceed at this point. I have not sustained the objection.

Mr. Goodman: I made that observation merely for the purpose of the record.

By Mr. Goodman:

Q. What, if anything, did you tell Dr. Zolan about your childhood with your grandparents? A. I don't remember exactly.

Q. Did you tell him that you felt ever since you were old enough to recognize and understand that your grandparents preferred the other children to you?

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Mr. Cahn: You see, that is exactly what I mean, your Honor. This is not proper on a direct examination of the witness. He can tell us what he told Dr. Zolan. He has already told us that his childhood was happy with his maternal grandparents and I don't think it proper for counsel to lead the witness—any one of his own witnesses in so far as testimony is concerned.

676 The Court: Mr. Cahn, a lot of this rests in my discretion and I am going to permit him to proceed, and if I think he has overdone it I will stop it.

Mr. Cahn: I take an exception to your Honor's ruling.

(Question repeated by the Reporter.)

A. I don't know whether I said it in that wording or not, but that was my intent, I guess.

677 Q. You did intend to convey that impression to Dr. Zolan during the interview, is that correct, Mr. Phillips? A. Yes.

Q. Did your grandparents encourage you while you went to school both as a student and as an athlete? A. No, sir. They thought I had had enough schooling and they said they had only gone to school—

Q. You will have to speak up, please. A. They said that the schooling of the two of them was not past the third or fourth grade and they didn't see it necessary that I should have any more, and

678 I was a boy and should get out and go to work.

Q. Did you tell them after you had finished high school that you would like to go to college? A. Yes, sir.

Q. And what did they say? A. They said they didn't have any money to send me to college.

Q. Did they encourage you to try to work your way through college? A. No, sir. I suggested that I be allowed to go away from home and work in order that I may go to college.

Q. Mr. Phillips, how old were you when you first had relations with a girl? A. About 11 or 12 years old.

Q. Did you force that girl to submit to you? A. I don't remember the first time, whether it was the first, second, third, fourth, or not.

Mr. Cahn: I didn't hear that.
(Answer read by the Reporter.)

Q. Is it not true that you began to have sexual relations with girls when you were at about 11 or 12 years of age? A. Yes, sir.

Q. Is it also true that you on many occasions forced girls to give themselves to you? A. Yes, 670
sir.

Q. How old were you when you met Mynita Graham? A. I was 18.

Q. How old was she? A. 15.

Q. Before you had met Mynita had you met some other girl, a particular girl? A. Yes, sir.

Q. What was her name? A. Evelyn Scott.

Q. And how old were you when you met Evelyn Scott? A. About 16.

Q. How old was she? A. 15.

Q. After you had known her did you begin to have sexual intimacies with her? A. Yes, sir. 681

Q. Did you force her the first time? A. Yes, I assume it was a force.

Q. Did you marry her? A. Yes, sir.

Q. How old were you when you married her? A. 17.

Q. And how old was she then? A. 16.

Q. Tell the Court and jury about that marriage. What occurred? A. Well, Evelyn was living with an aunt and I was at the time living with my mother, and she and I started going around together and she was still in school, so her aunt started abusing her about having company or

going out with boys, and she and I started seeing one another surreptitiously and I would meet her after school and after church in the evening and whenever we would go to beaches and beach parties at night, et cetera.

And she had kept telling me about her aunt had beat her so much, and so I told her, "Then the best thing we can do is to get married."

And she said her aunt would never let her get married because she wanted her to finish school. I said, "Well, we could get married and keep it a
683 secret until you finish school, and meantime I will work and save some money and whenever it becomes so unbearable at home you would always have some place to go because you would have a husband to go to."

And we eventually got married. We went to West Palm Beach, Florida, and got married. And I went away on a job and while I was gone she began spreading the news around that she was married.

So when I came back after about a month and a half my grandmother had come to Florida then
684 and had requested my mother—saying that she was afraid that I was going to get in trouble because I had married this girl.

So I wanted to meet this Evelyn after my return back to Florida and I went around to her house and her aunt had sent to New York and requested that her mother come down. Her mother came and her mother was there at the time I went to visit on my return, so her mother wouldn't let me see her unless I got permission from the aunt which was away on business.

So I went to her aunt's business place and I asked her permission to enter her home to see Evelyn. She gave me that permission and I went

to see Evelyn and talked it over with her, why did she betray the trust that she and I had agreed to keep it a secret. And she said she only told her friend, and that's the way the word had gotten out.

So I told her then and there that if I couldn't trust her then that I would be afraid to trust her as a wife.

And so I went away and I left her there. So her aunt sent her away to school in Daytona Beach, Florida. So after the school had closed for that term she had been allowed to return to Miami and then she was sent to New York City 686 to live with her mother and I didn't see her again for about two years.

And in the meantime I had met Mynita and started going around with her.

Q. So you began a relationship with Mynita while you were still married to this Scott girl, is that right? A. Yes, sir.

Q. And while you were going around with Mynita were you also having sexual intimacies with other girls? A. Yes, sir.

Q. Now, what you have told me thus far you have already told Dr. Zolan, is that correct? A. 687 Yes, sir.

Q. How long after you got the annulment did you marry Mynita?

Mr. Cahn: Objection. There is no testimony here about any annulment.

The Court: All right, sustained. You are assuming that in the beginning of your question.

Mr. Goodman: I'm sorry, I thought the record indicated that there was an annulment of the marriage.

The Court: No.

By Mr. Goodman:

Q. Was your marriage with the Scott girl dissolved by some legal court paper? A. Yes, sir, there was an annulment.

Q. Who got the annulment? A. I did.

Q. How long after you got the annulment did you marry Mynita? A. Within two or three weeks.

Q. After your marriage to Mynita did you continue to live in Florida? A. Yes, sir.

689 Q. Did there come a time when you came north to New York City? A. Yes, sir.

Q. How long after? A. Oh, about five years, sir.

Q. When you got to New York City was that the first time you had ever met the man who said he was your father? A. Yes.

Q. Did you see him on and off for a period? A. I beg your pardon?

Q. Did you see your father on and off in New York City for a while? A. Yes, sir.

Q. Now, tell us how you were getting along with Mynita during this period of time after your first marriage to her. A. Well, it was quite un-

690 steady. Because at various times she would run back to her mother and she would come back. So that went on for a number of years.

Q. She kept leaving you and then returning, is that right? A. Yes, sir.

Q. At any time after she had left you or when she threatened to leave you did you indicate that you would get revenge upon her? A. No, sir.

Q. At any time that she returned to you after leaving did you use any violence upon her? A. We had fights, yes, sir.

Q. Well, did you ever strike her? A. Yes, sir.

Q. Did there come a time when your marriage to Mynita came to an end? A. Yes, sir.

Q. When was that? A. 1944.

Q. Did she divorce you or you her? A. She divorced me.

Q. Where? A. In Tampa, Florida.

Q. After she got that divorce did you see her again? A. Yes, sir.

Q. When and where? A. I saw her the end of the same year, in 1944, in New York City.

Q. Did you recommence your relationship with her? A. Yes, sir. 692

Q. Did you actually live with her as husband and wife or did you just see her occasionally? A. At that time I just saw her occasionally.

Q. And when you saw her did you have intimacies with her? A. Yes, at various times.

Q. Now, at or about the same time were you seeing and having sexual intimacies with other women? A. Yes, sir, I had another girl friend.

Q. What occurred in 1946 between you and Mynita? A. Well, Mynita had remarried and separated.

Q. Was she married to Mr. Graham, her present husband? A. No, sir, she was married to someone else. 693

Q. Yes? A. And she had separated and I was living in Brooklyn at the time and she came to my home one morning, one Saturday morning, and she rang the bell and I went down and there she was.

So I was glad to see her and we exchanged our happiness in meeting and she asked me to come in. I said, "Come in," and so she came upstairs to my place and she stayed quite a while and then she told me she had separated from her husband

and where she had moved to, on Lefferts Place in Brooklyn.

Q. Did she advise you that she had employment on a sleep-in job in Great Neck? A. Well, at this time she did not have the job in Great Neck. She was living alone on Lefferts Place and I began visiting her there and she began visiting me at St. James Place, where I lived.

So while she was over there we decided—we agreed that it was not satisfactory, the arrangement that she pay rent over there and I pay rent,
695 too, and we could dissolve the two and pay one rent.

And I moved her things into my place at 124 St. James Place, and after about a month she obtained this job in Great Neck with Mrs. Walker.

So she was—her clothes and things was at my place and on her days off like Thursdays and Sundays she would come back to Brooklyn to my place to get an exchange of clothes, et cetera, and what not.

Then we thought—the days that she couldn't come in I would go out to Great Neck where she
696 worked and spend the evenings there. And at my visiting her there she introduced me to Mr. and Mrs. Walker and they got to know me.

So in the interim I was working in the Brooklyn Navy yard and I was laid off that job in August of 1946 and I was looking around for a job and I couldn't get satisfactory employment, so I told her I was going back to Florida for the winter season and that I would be back in the beginning of spring, because we had planned to obtain this divorce from this second husband she had married, and we would remarry.

So I said for us to marry, to make as much money as possible to bring about this it would be

necessary that I should go to Florida where I possibly could make enough money to get started on.

She didn't want me to go alone. She said if I went to Florida she was going with me. So I told her that it would not be thrifty if she went to Florida along with me; if she continued on her job and saved the money that she could and I worked in Florida and saved the money that I could, that way we would be further ahead.

So she gave me the final word that wherever I went she was going, and just to throw it out of 698
my mind and forget about it, because I was not going to go to Florida by myself.

So the madam overheard that last conversation and came in and asked was I going to take Mynita to Florida, and I said, "No, I'm not planning to take her to Florida, but she insists if I go she is going, too."

So I explained to her what I had talked to her about, to stay there and work and save her money and I could go to Florida and work and save mine, and what we was planning on would have been easier for us. 699

So the lady said, "Well, I think that is best, too." So she says, "I don't want to hear anything from you because I have made my statement and that's the way it stands."

So the next morning I got up to go to Brooklyn. Mr. Walker came in and asked me did I want to work for him. So I asked him what he had in mind—

Q. May I interrupt you—were you sharing a room in the home of these people with Myneta at this time? A. No, sir, I wasn't hired at this time.

Q. Had you slept in their house the night before? A. Yes, sir.

Q. In the same room with Myneta? A. Yes, sir.

Q. Continue, please. A. So he offered me a job to work for him and I said, "I don't mind working for you. I would work for anyone, just a matter can we get together on the price."

He said, "I think we can easily get together on a price."

He said, "You know what couples are making and that is what Myneta will be working as, that is, you would be working as a couple."

701 I assumed that. He told me the average couple was getting $250 a month and room and board. So I said, "Well, we have been offered jobs for $300 a month" and I set that as a fair standard for our type of work.

So he says, "Well, you and Myneta talk it over. This is the deal. I think she is going in with you." And I said, "Yes, I think she is going over to Brooklyn with me." And he said to talk it over and let him know.

We talked it over and I still held out for $300 and he eventually came up to $275 and we accepted the job at $275 a month per couple.

702 Q. Let me interrupt, Mr. Phillips. Just prior to that had you been in the armed forces of the United States? A. Yes, sir.

Q. Which branch? A. The Navy, sir.

Q. Had you volunteered? A. No, sir, I was drafted.

Q. How long did you remain in service? A. Three months and twenty-five days.

Mr. Goodman: At this time I should like to offer in evidence the official record from the office of the Secretary with respect to this man's service.

Mr. Cahn: No objection.

(Paper referred to received in evidence and marked Defendant's Exhibit B.)

(Conference at bench not within hearing of the stenographer or jury.)

By Mr. Goodman:

Q. Did you then take this job at Great Neck as part of a couple with Myneta? A. Yes, sir.

Q. Now, did there come a time shortly after 704
you took this employment when you were driving your employer's car from Hempstead to Great Neck? Do you recall a particular time? A. Yes, sir.

Q. Were you alone on that occasion? A. Yes, sir.

Q. Had you just left Myneta in Hempstead? A. Yes, sir.

Q. Was this during daylight hours? A. Yes, sir.

Q. Now, tell the jury what occurred on that particular occasion. A. While driving back to 705
Great Neck after I had entered Great Neck Plaza and nearing the Great Neck Estates which is near a golf course, I passed a girl who was walking with a package under her arm, it seemed at that time.

Q. Was the girl alone? A. Yes, sir.

Q. About how old would you say she was? A. I didn't know at the time how old she was.

Q. Do you now know how old she was then? A. I learned she was 17 years old.

Q. Was she a negress? A. No, sir, she was a white girl.

Q. As I understand it, you were driving along in your employer's car and you saw this girl

walking alone with a package under her arm near a golf course; is that right? A. Yes, sir.

Q. And this was during daylight hours? A. Yes, sir.

Q. Tell the jury what occurrred. A. While I went around to the other side of the golf course and got out of the car and I came across the golf course and met her and—

Q. Was she walking on the golf course at the time you accosted her? A. Yes, sir, she cut adja-
707 cent across the golf course.

Q. Go ahead. A. I met her in the golf course near the side that I had gone around the opposite side from where I first saw her and I began talking to her there.

Q. What did you say? A. I first asked her could she give me some directions as to where South Drive was and she turned around to show me where South Drive was and I pinned her arms, put my arms around her and pinned her and pulled her down to the ground.

Q. Phillips, you raped that girl that day, didn't
708 you? A. (No response.)

Q. Yes or no? A. Yes, sir.

Q. Used a knife to force her to submit, didn't you? A. Yes, sir.

Q. You were convicted of that crime in this County Court, weren't you, Phillips? A. Yes, sir.

Q. Sentenced to State's Prison. A. Yes, sir.

Q. How many years? A. Ten, sir.

Q. How many did you serve? A. Ten.

Q. Didn't there come a time when you were released before your ten-year sentence, on probation or parole? A. Yes, sir, in 1952.

Q. That was about six years after you had been sentenced, is that right? A. Yes, sir.

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Q. And the authorities of our state saw fit to give you a chance before your time was up and to let you go out on parole, isn't that right? A. Yes, sir.

Q. Now, after you had gotten out on parole you were doing a job as a painter over around Levittown, weren't you? A. Yes, sir.

Q. How long after? A. How long after I was out?

Q. That's right, after you were released. A. I was released to that job. I went to that job one week after I was released.

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Q. And was it one week after you were released on parole that something happened or was it a little more? A. Little more than a week.

Q. About how long? A. Approximately two months.

Q. But then two months after you were released on parole to this job something happened in Levittown, didn't it? A. Yes, sir.

Q. Tell the jury what happened. A. I molested a lady's daughter.

Q. A little white child? A. Yes, sir.

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Q. How old, about? A. 5.

Q. Actually touched the privates of the child with your hand, didn't you? A. Yes, sir.

Q. You were returned to State's Prison because of that incident as a parole violator, weren't you, Phillips? A. Yes, sir.

Q. Now, after you were finally released did you see Myneta Graham again? A. Yes, sir.

Q. When was that? A. 1956.

Q. At that time she was then married to Graham? wasn't she? A. Yes, sir.

Q. You knew it? A. Yes, sir.

Q. At that time she had already adopted Sunday, hadn't she? A. Yes, sir.

Q. Did you take up your relationship with Myneta after being released from jail? A. Yes, sir.

Q. Incidentally, Myneta knew that you had gone to State's Prison for raping a white girl, didn't she? A. Yes, sir.

Q. But she still accepted you back, isn't that right? A. Yes, sir.

713 Q. And did you begin to see her clandestinely and have relations with her? A. Yes, sir.

Q. Tell the jury about whether or not you and Myneta and Sunday used to go out together socially. A. Yes, sir, we went out frequently.

Q. Sunday knew that you were having some sort of relationship with her mother, didn't she? A. Yes, sir.

Mr. Cahn: I am going to object to that.

The Court: Sustained.

Mr. Cahn: I ask that it be stricken.

714 The Court: Strike the answer from the record, and the jury told to disregard it.

Next question.

Q. Did you ever discuss with Sunday or did you hear her mother discuss with her in your presence whether or not she should mention to Mr. Graham the fact that Myneta was seeing you? A. Yes, sir. Myneta told her if she told her father he wouldn't like it and she might get in trouble if she told her father.

Q. Did you ever bump into Myneta and Sunday at a time when they were with Mr. Graham? A. Yes, sir.

Q. At that time did Sunday acknowledge that she knew you by greeting you? A. Yes, she did, surreptitiously.

Q. Now, after you got out of prison did you have any difficulty—and I am speaking about your final discharge or release—did you have any difficulty in getting employment? A. Yes, sir, I had quite a bit.

Q. As you went from position to position making applications for employment did you tell your prospective employers about your criminal record? A. Yes, sir. They wouldn't hire me because of that. 716

Q. Did you finally get a job because you didn't reveal it? A. Yes, sir. I begin telling a few lies. If they asked if I had ever been in prison I told them no, told them that I had recently returned to New York from North Carolina and I had worked for the American Tobacco Company, and subsequently I was given a few jobs.

Q. Now, at this time did Mrs. Graham, Myneta, tell you anything about her desire to return to you permanently? A. Yes. We had planned to remarry. 717

Q. Did she discuss with you a desire to be divorced and to remarry you? A. Yes, sir.

Q. What did you tell her? A. Well, I agreed. I was willing to, but I had told her to really think about what she was talking about because I didn't think it was something that she could easily do inasmuch as she would only have one count in the State of New York in which to get a divorce on.

Q. Phillips, in the meantime Myneta had given birth to a child of her own, didn't she? A. Yes, sir.

Q. A boy by the name of Michael? A. Yes, sir.

Q. Was there any conversation between you and Myneta as to the paternity, who was the father of that child? A. Yes, sir.

Q. What did she say to you? A. She said I was.

Q. And did you believe it? A. Well, I knew I possibly could have and didn't have any substantial basis which to argue against it, so I accepted it.

Q. Phillips, do you know what is meant by a
719 homosexual experience? A. Yes, sir.

Q. I am speaking about something between two men or two boys. A. Yes, sir.

Q. In your life did you ever participate in a homosexual act? A. Yes, sir.

Q. How old were you? A. I don't know exactly. I would have to guess about the age—somewhere around 10—9 or 10.

Q. Was it you who used your mouth or was it the other boy? A. No, someone else.

Q. I beg your pardon? A. No, sir, it was someone else.

720 Q. Do I understand then that you permitted your private to be inserted into the mouth of another boy? A. Yes, sir.

Q. How old did you say you were then? A. I assume—to the best of my recollection, about maybe 9 or 10.

Q. How frequently, if you can recall, did you do such a thing in your life? A. Well, I'd say about four times.

Q. Only as a boy or since you have grown up? A. Well, that is including since I was grown and a boy.

Q. Do you know what is considered an abnormal relationship between a man and woman? A. Yes, sir.

Q. Are you familiar with the type of relationship where a man uses his mouth on the private parts of a woman? A. Yes, sir.

Q. Have you ever engaged in that type of activity? A. Yes, sir.

Q. With whom? A. Myneta.

Q. Was that a frequent practice of yours? A. Yes, sir.

Q. Now, there isn't any question, is there, Phillips, that back in 1946 when you committed this rape upon that white girl that you could have had all the sexual gratification that you wanted from Myneta? She was available, wasn't she? A. Yes, sir. 722

Q. And as a matter of fact you had other girl friends who would have given themselves to you willingly at that time, isn't that true? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, in the course of reviewing your history with Dr. Zolan, did you discuss with him the frequency of your sexual relations with Myneta? A. Yes, sir.

Q. What did you tell him about how frequently you had marital relations with her? A. Well, there were sometimes sexual relations day and night for a period of time. Sometimes every day. Sometime they were just maybe two or three times a week. 723

Q. Did you tell Dr. Zolan that it was a frequent occurrence for you to have relations with Myneta as frequently as four and five times in each day? A. There have been, yes.

Q. Now, let us get down to the Thursday before May 12, 1958. Did you see Myneta Graham on the Thursday before May 12th? A. Yes, sir, I did.

Q. Where did you first see her on that day? A. At the beauty parlor on Franklin Street in Hempstead.

Q. Did you meet her by appointment or did you accidentally bump into her? A. No, I knew that she was there every Thursday around that time.

Q. Now, at that time were your relations with her cordial? Do you know what I mean? A. Well, they were the same as we always been.

Q. You were getting along well with her, were
725 you not? A. Yes.

Q. Considering the circumstances? A. Very well.

Q. That she told you that she didn't want to have any more part of you? A. No, sir.

Q. Now, after you met her on that Thursday what, if anything, did you do together? A. Well, I went into the rear room of this beauty parlor where she was sitting with the product she was representing, the Avon Products, and she says, "I will be with you in a minute." She was talking to the girl. So she said, "Did you see my
car?" And I said, "No."
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So she said, "Well, Graham just left and took the kids home and I though maybe you saw him drive off." She said, "He just this minute drove away," and I said, "Well, I must have just missed it. I didn't see it."

She said, "Well, what are we going to do tonight?" I said, "I don't know. What do you want to do?"

She said, "I just you to drive me over to Roosevelt to take some packages to a girl that works in a tavern over there," and she asked me if I knew the girl and I said yes and she said, "All

right, I will go home and get supper and I will be right back."

She said, "I will be back about 5:30," and I said, "I don't think I have time to be ready by 5:30."

She said, "Well, make it 6 o'clock," and I said, "O. K., 6 o'clock." I said, "I'll meet you at the center." That is the Hempstead shopping center in Hempstead.

So at 6 o'clock I was up at the center and she parked her car and came to my car and I drove my car to Roosevelt to deliver this package to this lady. 728

Q. Did you return with her from Roosevelt to Hempstead? A. Yes, sir.

Q. Where did you go? A. Went to my house.

Q. Into your room? A. Yes, sir.

Q. Did you have relations with her there and then? A. Yes, sir.

Q. Was there any conversation between you at that time to the effect that she wanted you to get out of her life? A. No, sir, she didn't.

Q. Did you tell her that you wanted to get even with her for any reason? A. No, sir, I had no reason to get even. I figured we were even. 729

Q. Did you tell her that if you got out of her life you wouldn't go alone? A. No, sir.

Q. Did you make an appointment to see her again thereafter? A. Yes, sir.

Q. When? A. I didn't make an appointment that night, but she called me at the house the next day and she said she wanted to see me. She would run out to go to the drug store and she wanted to see me.

So I said, "Well, what time are you coming out?" And she said, "In another fifteen minutes," and I said all right.

So this was the next evening, Friday evening, and so I drove my car up to the drug store and she parked there and I told her that I had got laid off my job that afternoon and we talked about that a few minutes. So she said, "Well, you will get something else," and asked me if I wanted her to speak to the Babbitts, the people she was working for in Jericho, and I said, "About what?"

She said, "Maybe he can help you get another job," and I said, "I don't know. I plan to take this floor-waxing venture and try to start my own
731 business."

Q. Did you have an argument with her during this period or meeting with her? A. No, sir. She told me that her husband had been asking her about her relationship or going around with me, and said some painter friend of theirs had described me to him because subsequently he didn't know me on sight. He only knew my name, and she called the fellow's name and I don't know the man, but said that her husband had told her that this fellow said he had seen her about, going about in either her car or my car, and he had
732 asked her about it and he was very warm about it and threatening about it. So she figured she would come out and tell me about it so in case she couldn't get out as much as she had been that was the reason why.

So I said, "Well, all right, just take it easy," and she said, "Well, I got to go right back because I only ran out to go to the drug store," and I left her and she went back home.

Q. When did you next see her? A. She said, "I will see you tomorrow when I go shopping."

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Q. Did you see her the next day when she went shopping? A. Yes, she went shopping in the Safeway store.

Q. Did you argue with her that day? A. No, sir, there was no arguments.

Q. Did you tell her that you wanted to get even with her for some reason? A. No, sir.

Q. Did you tell her then that if you got out of her life that you wouldn't go alone? A. No, sir.

Q. Did you ever tell her that? A. I never told her that.

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Q. Now, let's get down to May 12, 1958.

The Court: We will have a ten-minute recess.

Gentlemen, do not discuss this case amongst yourselves or formulate or express an opinion until you finally deliberate at the end of the case and after the Court's charge. A ten-minute recess.

(A ten-minute recess was thereupon taken.)

(After recess.)

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WILLARD H. PHILLIPS, the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Drect examination (continued) by Mr. Goodman:

Q. Phillips, when you told Mr. Benoit and myself about what had occurred between you and Sunday Graham on May 12th did you tell us the same story that appears in this confession of yours now in evidence? A. No, sir.

736 *Willard H. Phillips—Defendant—Direct*

Q. You told us, did you not, that the crime took place at a point entirely different from that in which you made—I'm sorry. Withdrawn. From that which appears in the confession, did you not?

Mr. Cahn: Objection.

The Court: Sustained.

Mr. Goodman: If your Honor please, I would most respectfully submit that evidence of deception on the part of this man towards his own counsel is of great significance in so
737 far as the doctors are concerned in aiding this jury—

The Court: Then ask him that.

Mr. Cahn: I have no objection to what the witness told counsel, but let him tell us what he told you. Not you.

The Court: Objection sustained as to form.

By Mr. Goodman:

Q. Did you tell us that the crime took place at a particular point? A. Yes, sir.

738 Q. Was that the same point as appears in your confession now in evidence? A. No, sir.

Q. Did you tell us with respect to when or if you ever had an intention to violate Sunday Graham? A. No, sir.

Q. Did you tell us that you made up your mind to rape that child when she got into your automobile, and you were then in Greenwich Street? A. No, sir.

Q. You did not tell that to your lawyers, did you? A. No, sir.

Q. Did you tell us that Mr. Cahn and Mr. Lockman questioned you for almost an hour with Mr.

739

Birchall, in front of you, before you broke down and confessed? A. Yes, sir.

Q. You told us that? A. Yes, sir.

Q. Are you sure, now, Phillips? A. Yes, sir.

Q. Did you tell us that when you confessed you asked that the police officers be brought into the room and that you stood up and shook hands with them before you confessed? A. Yes, sir.

Q. Did you tell us that, too? A. Yes.

Q. Did you go down Cruikshank Avenue that day with the intention and desire to meet Sunday Graham and pick her up in your automobile? 740
A. No, sir.

Q. Was your car at a stop when Sunday Graham—when you first saw Sunday Graham? A. No, sir.

Q. It was in motion? A. Yes, sir.

Q. Did you call out to the child or did she call out to you? A. She hollered to me.

Q. And then did you stop your car? A. Yes, sir.

Q. And she came over to it? A. Yes, sir.

Q. What did you say to her and what did she say to you? A. She asked me—she said, "Hi, 741
where are you going?"

I said, "I've got to go to the village. I've got to attend to some business."

So she said, "Take me home."

I said, "I can't take you home. I've got to go to the village on some business."

So she said—I said, "Well, come on, I'll take you home."

And she got in and said O. K. and said, "Don't take me all the way home."

I said, "Why?"

742 *Willard H. Phillips—Defendant—Direct*

She said, "Because daddy is at home."

I said, "O. K., I'll drop you off before you get home." And then I drove away.

Q. Did you stop to buy some ice cream? A. Yes, sir.

Q. Where? A. I saw one of those mobile ice cream trucks.

Q. Where was the truck? A. Down near Kennedy Park on Greenwich Street.

Q. After you bought the ice cream did you then make up your own mind to have sexual relations
743 with that little girl? A. No, sir.

Q. Did there ever come a time when you intended and planned to have sexual relations with that girl? A. No, sir.

Q. You are saying that knowing that your confession says that you made up your mind on Greenwich Street to do so, isn't that true?

Mr. Cahn: I object to what counsel says the witness knows. He is leading and I think this is most improper.

The Court: Sustained.

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Q. Is it now your testimony, Phillips, that you never intended at any time to have sexual relations with that little girl? A. No, sir.

Q. Is that your testimony now? A. Yes, sir.

Q. Where did you drive with her? A. Well, I drove up Greenwich, through Roosevelt and through Merrick down to Bellmore.

And during the drive—after I bought the ice cream and began to eat it she began to tease me about she won't see me any more.

I said, "See who?"

She said, "Mama and I and Mike. We won't see you any more."

I said, "Why?"

She said, "Mama says she's not going to see you any more."

I said, "When did she tell you this?"

She said, "Saturday."

I said, "After you left me Saturday?" She says yes.

I said, "Why would she tell you that?"

She says, "I don't know, because mommy says everywhere she goes you show up. And she's not 746
going to see you any more."

I said, "Oh, quit your kidding." And she says, "I'm not kidding."

I said, "Come on and quit kidding. Don't tease like that. You know your mother didn't tell you that."

She said, "Oh, yes, she did." And she started badgering me and kidding me about it and I was going through Nassau Road and Babylon Turnpike and into Merrick.

Q. Did you stop that car with the child in it around Babylon Turnpike near the Meadowbrook 747
Causeway? A. No, sir.

Q. You continued driving past that point? A. Yes, sir, I went down Babylon Turnpike to Smith Street and went down Smith to Newbridge Road and into Bellmore.

Q. When you reached Newbridge Road which way did you go? A. I went south towards the bay.

Q. Did you drive your automobile with the child in it down to the foot of Newbridge Road at the bay? A. Yes, sir.

748 *Willard H. Phillips—Defendant—Direct*

Q. Did you park the car there? A. Yes, sir.

Q. What, if anything, occurred between you and the child down there? A. Well, I tried to reason with her and I tried to get her to tell me the truth, whether or not that she had been telling me the truth or not, and then she began crying and says, "I want to go home." And she says, "Mama is expecting me and told me, 'Don't be no more than a half hour getting home.' "

So I said, "You're not telling me the truth and
749 I don't want you to tell me stories like that because I don't believe mother told you that."

She said, "O. K., let's go and I will tell you the truth." And I started driving away from there.

Q. Now, during that time that you were parked in the automobile down there at the foot of Newbridge Road with that child that day did you remain in the front seat with her? A. Yes, sir.

Q. Didn't go in the back? A. No, sir.

Q. And then where did you go? A. I drove out to Merrick Road and I crossed that corner there and then she started kidding me again and says, "I'm not going to tell you anything." I said,
750 "Are you kidding?" And she says no.

So she kept on and I started driving and I drove down until I got to Wantagh State Parkway and I went across the parkway.

Q. You drove north on Wantagh State Parkway? A. Yes, sir.

Q. To where? A. To Hempstead Turnpike.

Q. And then where did you go? A. Then I went out Hempstead Turnpike towards Farmingdale.

Q. Did there come a time when you parked the car? A. Yes, sir.

Q. Where? A. Behind a church in Old Bethpage, I think it is.

Q. Anywhere near the golf course out there? A. There is a golf course—I passed a golf course before I got there.

Q. Well, where with relation to the church did you go with your automobile? A. Well, the church sits up on a high hill and I could see it from the road. I went up a side road until I came to the church and there was a yard in back like black asphalt top, and I drove up in the yard and I said, 752
"Now, are you going to tell me or I'm not going to take you home." I said, "If you don't tell me I am going to play with your pocketbook."

Q. You told her that? A. Yes.

Q. Do you now know that the child knew what you meant by the expression pocketbook? A. Yes, because—

Q. Just yes or no. A. Yes.

Q. Had that expression ever been used with the child in your presence? A. Yes, sir.

Q. Tell the jury what you understood the child understood was meant by that expression that day. A. Well, her mother referred to her vagina 753
as her pocketbook.

Q. And you told then that child that if she didn't tell you the truth you were going to play with her privates, is that it? A. Yes, sir.

Q. Were you seated in the front of the car or the back at that time? A. In the front.

Q. Then what did you do? A. And she said, "No, you don't," and we started fighting and I crawled over the back of the seat and reached and grabbed her and pulled her over and started—told her, "If you don't tell me the truth I am going

to play with your pocketbook." Knowing that she is sensitive about even mentioning or talking about it. And I felt in that way that—

Q. Speak up. It is hard to hear you. A. I felt in that manner I would be able to determine whether she was actually told the things she was telling me, or was she just kidding me on it or not. And I laid her down on the back seat and started tickling and playing with her.

Q. Did she resist you? A. Yes.

755 Q. Did she fight and scream? A. Yes, screaming and fighting.

Q. Now, can you tell us what, if anything, you recall happened thereafter? A. Well, I began taking her panties down and she was fighting and, you know, holding herself and going like this with her hands (illustrating) and I took her hands and held them up and she kept screaming.

And the next thing I remember about it I was on my knees between her legs and looking at her, and the next thing I knew I was holding her belt in my hand like this (indicating).

756 Q. You are indicating that you were holding the end of the belt in your left hand, is it? A. Yes, sir.

Q. What else? A. Well, I looked on her dress. About here (indicating) was a sperm, a discharge, and I took my handkerchief and wiped it off the dress.

Q. What else? A. And then I sat down in the car. Then I said, "Come on, let's go home." And I said, "Come on, get up, let's go home."

And she didn't move and didn't get up, so I looked at her and I shook her and she still didn't move, so I reached over and took her over in my

arms and she didn't act like she was going to get up, so I started holding my ears down near her to see if she was breathing or her heart was beating or anything, and I didn't hear anything and I just got panicky about it.

Q. Then what did you do? A. Well, I sat there for a while holding her in my arms, for quite a while.

Q. And then what? A. And then I got over in the front seat and started driving back in this direction.

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Q. When you got back into the front seat and started to drive where was the body of the child, in the back? A. On the seat.

Q. Was it on the seat? A. Yes.

Q. Not on the floor? A. No, sir.

Q. Where did you drive? A. I drove back down Hempstead Turnpike to—at this end of Mitchel Field, and I came over as far as that street would carry me.

Q. What street did you say? A. I don't know the name of the street. It is the western side of Mitchel Field. It goes down from Hempstead Turnpike and it deadends down by the west— 759 by one of the gates of Mitchel Field.

Q. Had you driven all the way, all the length of Hempstead Turnpike from Bethpage up to that point near Mitchel Field? A. Yes, sir.

Q. Through Levittown? A. Yes, sir.

Q. And then you turned and went over towards the gate at Mitchel Field, is that right? A. Yes, sir.

Q. Then where did you go? A. Then I drove down to Clinton Avenue or Clinton Road, I believe it is.

760 *Willard H. Phillips—Defendant—Direct*

Q. Was the child's body still on the back seat and not on the floor in the back all this time? A. Yes, sir.

Q. And then where did you go? A. I drove out Clinton Road to Old County Road and came down here to Mineola to Mr. Scott. On Third Avenue.

Q. Did you park your automobile here in the vilage of Mineola? A. Yes, sir.

Q. And did you stop and park your automobile
761 on Third Street, Mineola, just off Old Country Road? A. Yes, sir. Either Third Street or Third Avenue.

Q. Or Third Avenue? A. Whichever it is. I don't know the name.

Q. And what did you do next? A. Well, I went upstairs to keep an appointment I had with Mr. Scott. That floor-waxing business.

Q. This adress where you went to see Mr. Scott is a public building, is it not? A. Yes, sir, it is.

Q. Just one short block from the busy intersection of Franklin Avenue and Old County Road, is that right? A. Yes, about a block.

762 Q. And about what time was this, Phillips? A. Near 5 o'clock.

Q. Was it still daylight? A. Yes, sir.

Q. And was the child's body still lying on the back seat of that automobile? A. Yes, sir.

Q. And you went upstairs into the floor-waxing place to see Mr. Scott, is that right? A. Yes, sir.

Q. And did you make an application for a position with his firm? A. Yes, I made an application to obtain floor-waxing equipment.

Q. How long did you remain up there? A. Until past six o'clock.

Q. And all the time the child's body was on the back seat of your car parked down in front, is that right? A. It was parked on Third Avenue, yes.

Q. And did you fill out an application for this connection with the floor-waxing people after discussing it with Mr. Scott? A. No, I filled out the application prior to my interview with him.

Mr. Goodman: I call upon the prosecution to please produce the original of the application. 764

(Paper produced by the District Attorney.)

Q. I ask you to look at this paper, Mr. Phillips, and tell me whether you recognize it. A. Yes, sir.

Q. Do you notice that that paper has both printing and handwriting on it? A. Yes, sir.

Q. Whose handwriting is it? A. My name is signed at the bottom.

Q. Well, who filled out the application? A. I did. 765

Q. Is all that in your own handwriting or hand printing? A. Yes, sir.

Q. And this you did while you spent that hour upstairs in this floor-waxing concern, is that right? A. Yes, sir.

Q. All the time that child's body was on the back seat of your car parked downstairs, is that right? A. Yes, sir.

Mr. Goodman: I offer the paper in evidence.

766 *Willard H. Phillips—Defendant—Direct*

Mr. Cahn: No objection.

(Application received in evidence and marked Defendant's Exhibit C.)

Q. After you got through with the floor-waxing concern what did you next do, Phillips? A. I drove my car back down to Clinton Avenue and back over to this road that I had just came down. I just retraced my trip back as far as the Mitchel Field gate.

767 And I turned around there and came back to where I saw the warehouses—what seemed like warehouses.

Q. Yes? A. Then I left Sunday over behind the warehouse.

Q. Then what did you do? A. Then I went up to Grant's in Hempstead.

Q. Went to where? A. Grant's five and dime store.

Q. Grant's five and dime store in Hempstead? A. Yes, sir.

Q. And what did you do in Grant's five and
768 dime store in Hempstead? A. I went back to return a record that I had got earlier in the morning. And exchange it for another record album.

Q. You brought a photograph record that you had bought the day before from Grant's into this store to have it exchanged because it was not the record that you had ordered? Is that what you tell us? A. Yes, I bought the record that morning and I was returning it to exchange it because the label stated some songs and when you played the record it played other songs. And the songs that it played were not the songs that I desired. I took it to make an exchange.

Q. And you did this immediately after you had left that child's body over there at Garden City, is that right? A. Yes.

Q. Then what did you do? A. Then I went up on Franklin Avenue to a restaurant for dinner.

Q. Weren't you in communication with Mrs. Graham by telephone at or about this time? A. Well, after I ate. After I ate I called her. About 7 o'clock or thereabouts.

Q. You had a meal in this restaurant immediately after you had been at Grant's, is that right, in Hempstead? A. Yes. 770

Q. And then you called Mrs. Graham? A. On the telephone, yes, sir.

Q. Can you recall in words or substance what she said to you and what you said to her on that occasion? A. Yes, sir.

Q. Tell us what was said. A. Well, I called her and she answered and I said, "You can't call me so I called you."

She said, "Where are you, home?"

I said, "No, I'm not home yet. I'm on my way."

She said, "Well, Sunday didn't come home." 771

I said, "Didn't come home from where?"

She said, "She didn't come home from school."

I said, "Well, have you been looking for her?" And she said, "Yes, I have been looking and everybody is looking."

So I says, "Well, I'll go right home and then," I said, "I'll go out and I'll look myself." So I left and went home.

Q. Did you do anything else that evening? A. Yes, sir. After I went home and took my record upstairs and threw it on my bed and came on back

down and talked to Mrs. Watson about ten or fifteen minutes and she said that Myneta had been trying to get me on the telephone. I told her that I had just called her and talked with her.

So I left and walked out of the house to get in my car and then her brother came by at the time, he and his wife in his car, and I asked him what he had heard and what had he seen. He said he hadn't seen anything. He had been every place and nothing could be found.

773 So I said, well, all right, so I got in my car then and I started driving around the village and I went over to my friend's house on Princeton Street in Hempstead Heights and I asked them had they seen Sunday.

Q. You asked them if they had seen Sunday? A. She and her daughter, yes, and she said no, they had not seen them, and I stayed there a few minutes—just how long I don't recall—fifteen or twenty minutes I assume, and I left and I started passing schoolhouses and school yards and different streets where I saw kids playing, I thought maybe—

774 Q. What did you think? A. I would see her.

Q. You thought that you would see Sunday if you were looking in these school yards? A. Yes, at that time I thought I would.

Q. Go ahead. A. Then I went to Roosevelt to my cousin's house and I told her about my conversation with Mrs. Graham—she said Sunday hadn't come home and I had been out and I was tired and I was running all over up and down various streets where I thought maybe she possibly would be, and my cousin said, "Will

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you wait and take me over to her house?" and I said, "Yes, I will take you over there."

So she got dressed and I took her back to Hempstead to Mrs. Graham's.

Mr. Goodman: You may inquire, Mr. District Attorney.

Cross-examination by Mr. Cahn:

Q. Remember me, Mr. Phillips? A. Yes, sir.

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Q. Mr. Phillips, on May 12, 1958 did you rape and murder Sunday Graham? A. I don't recall raping her.

Q. I don't hear you, sir. A. I don't recall raping her, sir.

Q. Did you murder her? A. No, sir, I don't recall that.

Q. You don't recall that? A. No, sir.

Q. Do you recall telling me about it, Mr. Phillips? A. Yes, sir.

Q. You recall telling me about it? A. Yes, sir.

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Q. Isn't it a fact, sir, that you don't want to recall it today? A. No, sir.

Q. I ask you again, sir: On May 12, 1958 did you rape and murder Sunday Graham? A. No, sir, I don't recall raping and murdering her.

Q. You don't recall that? A. No.

Q. You don't recall testifying on direct examination, sir, that you pulled her panties off? A. Yes, sir.

Q. Do you remember that, sir? A. I remember starting to pull them off, yes, sir.

Q. Do you remember on direct examination saying you held a belt in your left hand? A. I recall, yes, sir.

Q. And you are telling me now, sir, that you don't remember raping and murdering Sunday Graham? A. No, sir, I don't remember because there was a blackout period and some things I can't recall that have been testified to that I don't remember because I don't remember them actually happening; therefore, I can't testify that I
779 remember them happening.

Q. Do you remember telling me, sir, your putting her pants in her mouth? A. No, sir.

Q. You don't remember telling me that? A. Yes, I remember telling you that, yes, sir.

Q. But now you don't remember that A. No, I don't remember putting them in there, sir.

Q. You remember telling me about putting the belt around her neck? A. I remember telling you, yes, sir.

Q. But now you don't remember that? A. No, sir. What I actually remember is a certain shock
780 came to me and what I assumed the shock to have been was a semen discharge and then recognized that I was holding the belt in my hand and she had the panties in her mouth, and to add whatever or deduct by process of elimination whatever occurred prior to my recognizing, that my being the only person there I must have done it. But, as a recollection I do not recall putting the belt around her neck. I do not recall putting the pants in her mouth.

Q. You told us, Mr. Phillips, that you wanted to go to college. A. Yes, sir.

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Q. And that your maternal grandmother, I believe, didn't want you to go? A. No, she didn't want me to go. She said they didn't have money which to send me to college.

Q. Did you go, sir? A. No, sir.

Q. You never went to college? A. No, sir, I didn't.

Q. That is the truth, sir? A. It is.

Q. Did you ever tell anybody that you went to college? A. I did.

Q. When? A. Various times.

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Q. Did you ever testify under oath that you went to college? A. Yes, sir.

Q. When was that, sir? A. 1947.

Q. It was in this previous case that you told us about—you testified under oath that you went to college, did you not? A. I did.

Q. That you went to college for a year? A. Yes.

Q. At Dillard University, was it not? A. That's right.

Q. In New Orleans? A. That's right.

Q. And now you are telling us that it is not true? A. It isn't. That was raised in the previous trial by an agreement between the now Mrs. Graham and my defense attorney at that time because she and I had planned to go to college together. She went that term. I was unable to go and it was some opinion of hers at the time should I state that I went it would have been helpful at that previous trial. Therefore, I made that statement.

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Q. But you knew at that time, sir, that what you were testifying to was a lie? A. Probably.

Q. Well, is there any question about it in your mind, Mr. Phillips? A. You asked me did I know at that time that it was a lie and I said I probably did.

Q. Now, you have told us that that previous case was about raping a 17-year-old white girl, did you not? A. Yes, it was an attempted rape.

Q. An attempted rape? A. Yes.

Q. You said you threatened her with a knife. A. Yes, I had a knife.

785 Q. Isn't it a fact, Mr. Phillips, that you plunged that knife into her throat four inches? A. I don't know whether it was four inches, but she did get cut with the knife.

Q. Pardon? A. She did get cut with the knife.

Q. In her throat? A. Inside of her throat, yes.

Q. Ins't it a fact, sir, that up until this very moment in this courtroom you denied your guilt in that case? A. I beg your pardon?

Q. I'll put it this way, Mr. Phillips: Did you ever tell anybody in open court during the entire proceedings of that case or at any time until this courtroom procedure that you had raped that

786 girl? A. Yes, I told someone.

Q. Who? A. I told those two gentlemen sitting right there (indicating).

Q. Indicating Dr. Meister and Dr. D'Angelo? A. I don't know their names. I told them. I also told Dr. Zolan. I told the defense attorneys in this case.

Q. Up until this case, sir, isn't it a fact that you never admitted that rape to anybody up until you told those gentlemen? A. That's true.

Q. During the entire proceedings you denied your guilt, isn't that correct? A. That's right, sir.

Q. And isn't it a fact, sir, that Myneta Graham testified on your behalf in that trial? A. Yes, sir.

Q. And isn't it a fact, Mr. Phillips, that you denied your guilt to Myneta Graham? A. Yes, sir.

Q. And isn't it a fact up until the present time you have denied your guilt on that case to Myneta Graham? A. No, sir.

Q. When did you tell her about it that you were guilty? A. Since my relationship with her since 788
1956.

Q. That was the first time? A. Yes, sir.

Q. But you never told anybody else at that time, did you? A. I believe I have, sir.

Q. Who? A. My folks, my cousin.

Q. Your family? A. Yes, sir.

Q. And isn't it a fact, sir, that your conviction in that case was based on the identification of you by that girl whom you stabbed? A. Yes, sir.

Q. And isn't it a fact, Mr. Phillips, that you weren't going to let that happen to you again this time? A. No, sir.

Q. And that is why you killed Sunday Graham? 789
A. No, sir, that is not true.

Q. Now, you told us on direct examination that you figured you were even with Myneta. What did you mean by that, sir? A. I said I believed we were even. There was no intent of trying to get even otherwise. We understood one another. We had a mutual understanding. There was no belligerence between us. There was no animosity as far as I knew. She has always been amiable and always been friendly.

Q. By the way, that previous rape, sir, what time did that take place? A. About between 5 and 5:30 in the evening.

Q. About 5:30 in the evening? Do you remember the date? A. Yes, I do.

Q. What was it? A. The 21st of November.

Q. 21st of November, and at 5:30 in the evening was Standard Time, was it not? A. I don't remember whether it was Standard or whether it was—

791 Q. You don't remember? A. I could think now whether it was or not, but I don't remember.

Q. What do you think now? A. I believe it was.

Q. And you are telling us it was broad daylight outside at that time? A. It was daylight.

Q. Isn't it a fact, Mr. Phillips, that a great deal of time was spent on the fact as to where the light was located on that golf course to enable that girl to identify you? A. Whatever light there was, if there was a light, the light was on the street post.

Q. And those lights were on, were they not? A. I don't recall any lights being on.

792 Q. Well, isn't it a fact that a great deal of time was spent in that previous case in determining whether or not the lights were on? A. I remember some discussion about lights.

Q. Yes. A. Just what it was I just don't remember exactly.

Q. You are telling us now it was broad daylight? A. It was daylight.

Q. At 5:30 in the evening, Standard Time, on November 21st? A. At 5:30 I was at Mrs. Walker's home. In fact, I was there before 5:30 and all this had taken place.

Q. At what time? A. I said it was between 5 and 5:30 because I know where I was at 5 o'clock and I know where I was at 5:25, and it wasn't on the golf course.

Q. You said that Sunday was sensitive about talking about her pocketbook, taking it in the light that you knew her to take it. A. She was sensitive, yes.

Q. And you knew it was wrong to talk to her about that, didn't you, Mr. Phillips? A. No, sir, there was nothing wrong about it.

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Q. Well, did you know it was wrong to play with her private parts? A. Well, what's wrong about it?

Q. What's wrong about it? A. Yes, sir.

Q. I am asking you the question, sir. A. I didn't see anything wrong.

Q. Playing with her private parts? A. Well, if you are in private, there is nothing wrong with it.

Q. Nothing wrong with it? A. No.

Q. You didn't tell me that night that you didn't see anything wrong with it, did you? A. You didn't ask me, sir.

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Q. Well, do you know it is wrong to have intercourse with a girl 8 years old? A. Against her will, yes.

Q. You know that's wrong, sir? A. (No response.)

Q. Do you not? A. I beg your pardon?

Q. You know that is wrong? A. Against her will, yes, it is wrong.

Q. And was Sunday Graham willing to have intercourse with you? A. No, sir. There was no intent to have intercourse with her.

Q. So that when you told me that you decided to have intercourse with her on Greenwich Street, that is not the truth? A. No, sir.

Q. You are telling us the truth today? A. Yes, sir.

Q. You have discussed this case fully with your attorney, have you not? A. I certainly have.

Q. And you have discussed this case fully with Dr. Zolan? A. Yes, sir.

Mr. Goodman: For the record, if your Honor please, I am sure that the learned District Attorney doesn't intend to infer that I suborn perjury here or suggested the manner in which this man testify.

The Court: It is on the record. It speaks for itself.

Q. Do you remember this question and this answer, Mr. Phillips:

"Q. And as a result of her not wanting to have intercourse with you and screaming that it hurt, you put the— A. She started a fight. You know how those things are."

Do you remember that question and that answer? A. Yes, sir.

Q. Was it the truth? A. No, sir.

Q. It is not the truth? A. No, sir.

Q. You are telling us the truth today? A. Yes, sir.

Q. "Q. Then you put the belt around her neck? A. Later."

Do you remember that question and that answer? A. I remember the question. I don't remember the answer. I don't remember "later." I don't connect "later," with the question, sir.

Q. Do you remember this question that I asked you and the answer that you made:

"Q. Later? And you kept the panties in her mouth. A. Yes."

Do you remember that question and that answer? A. Yes, sir, I remember it.

Q. Was that the truth? A. No, sir.

Q. You are telling us the truth today? A. I just told you, sir, yes, sir, I am telling you the truth today.

Q. Do you remember this question and this answer: 800

"Q. Was that to stop her from screaming? A. Yes."

Do you remember that question and that answer, sir? A. Yes, sir.

Q. Was that the truth? A. Yes, sir.

Q. That was the truth? A. Yes, sir.

Q. That it was to stop her from screaming? A. Yes, sir.

Q. Do you remember this question and this answer:

"Q. Well, then, afterwards you took her belt and you put it around her neck, didn't you? A. I told you that." 801

Do you remember that question and that answer? A. I can't say yes or no to that. I don't remember to give you an answer directly, Mr. Cahn, but I probably did tell you that.

Q. Well do you remember this question and this answer, Mr. Phillips:

"Q. Well, that was to make sure she was dead, wasn't it, Mr. Phillips? A. That reasoning on your part is as good as anything I could give. I don't recall having any reason whatsoever. It possibly is true." A. It probably was the answer.

Q. Do you remember that? A. It probably is the question and answer.

Q. I don't hear you. A. It probably is the question and answer raised at the time. I can't remember it in its entirety.

Q. Is it the truth? A. Something in that essence, the question that brought about that proximate answer:

Q. Do you remember this question and this answer:

803 "Q. Well, before you told me what you did you crossed yourself, did you not, Mr. Phillips? A. I crossed myself?

"Q. Yes. A. I did?

"Q. You made the sign of the crucifix, did you not? A. Yes. I said a little prayer."

Do you remember those questions and those answers, Mr. Phillips? A. I remember telling you I said a prayer, yes, sir, I remember that.

Q. Do you remember this question and this answer:

"Q. And you said a little prayer because you knew you did wrong, did you not? A. Yes."

804 Do you remember that question and that answer, Mr. Phillips? A. No, not in its entirety, sir.

Q. What part of it do you remember, sir? A. I can remember you talking to me along that line but I don't remember answering you, because the way the question was put to me now I wouldn't answer that way. I wouldn't tell you that.

Q. You wouldn't tell me that now? A. No, sir.

Q. You have had a great deal of time to think this over, haven't you, Mr. Phillips? A. At that time I had very little alternative as to what I told you, sir.

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Q. You had very little alternative as to what you told me? A. Yes, the state of shock that I was in at that time. I couldn't have been in a reasonable state of mind in order to be able to reason an answer, to give you proper answers.

Q. You couldn't give me a proper answer or a reasonable answer? A. No, sir, I gave you answers that would expedite your interrogation as quickly as possible. I had been through that for almost two days after being beaten around and forced to do different things. I had no alternative. I had to figure the easiest way which was to tell you whatever you wanted to know.

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Q. That was the easiest way out? A. At that time I assumed that was the easiest way out.

Q. Well, do you remember this question and this answer, Mr. Phillips:

"Q. And it was after you saw Mrs. Clemens that you picked her up at the school? A. Yes. I didn't pick her up at the school.

"Q. Where did you pick her up? A. I met her coming down Cruikshank Avenue."

Do you remember those questions and those answers, Mr. Phillips? A. Yes, vaguely, sir.

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Q. You were well enough to tell me that you didn't pick her up at the school but you picked her up at Cruikshank Avenue. You corrected me there, did you not, Mr. Phillips? A. Well, I guess I did—I was almost in a state to coin a word that I learned from World War II or the Korean War —I was almost in a state of brainwash.

Q. Brainwash? A. Yes, sir. These gentlemen (indicating) had carried me through so much and had told me so much, from what they said it should have been that I possibly could have repeated the same thing.

808 Q. Pardon? A. These gentlemen, the two of them sitting here (indicating).

Q. Yes? A. Had carried me through so much questioning and "It was this way, wasn't it? Wasn't it this way? Wasn't it like this? Didn't you meet her on Cruikshank? Didn't you pick her up there?"—from three or four different guys around at one time it is possible that I told you those same things.

Q. But you don't remember doing these things, do you, Mr. Phillips? A. Doing what, sir?

809 Q. What you are here charged with doing? A. I told you what I remember, and those I don't remember I can't recall.

Q. Mr. Phillips, isn't it true that only one man in the world knew where this pocketbook was and that was you? A. I don't know that, sir.

Q. You don't know that? A. No, sir.

Q. Didn't you throw this pocketbook? A. I don't remember throwing it.

Q. You don't remember throwing it? A. When I saw it this detective had it (indicating).

810 Mr. Goodman: Indicating Det. Stark.

A. (continuing) Stark, he had it. He asked me was that Sunday's pocketbook and I told him it looks like her pocketbook.

Q. Didn't you tell him where to find that pocketbook, sir? A. No, sir.

Q. You did not? A. No, sir.

Q. And when Det. Stark stated that on the witness stand he was lying? A. He is, definitely lying. He knows he is lying.

Q. Do you remember calling for Det. Danny? A. Yes, sir.

Q. And do you remember calling for Chief Pinnell? A. Yes, sir.

Q. Do you recall calling for Lieutenant Cummings? A. Well, I believe Sgt. Cummings.

Q. He was a Sergeant at that time, was he not? A. Yes, sir.

Q. You remember that, don't you? A. And Captain Lada.

Q. And you remember that the Captain was a Captain at that time? A. Yes, sir.

Q. This you remember, sir? A. Yes, sir.

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Q. You weren't in that complete state of shock that you didn't remember that? A. I am telling you everything I remember.

Q. Well, do you remember telling me, "I'm sunk"? A. I'm what?

Q. Sunk. A. No, sir.

Q. You don't remember telling me that? A. No, sir.

Q. Would you say you didn't tell it to me? A. No, I won't.

Q. Do you remember this question and this answer:

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"Q. All right, now, Mr. Phillips, where did you take Sunday when you picked her up from the school? A. May I see her mother again so I can talk?"

Do you remember asking me for that? A. I remember asking to see Mrs. Graham, yes, sir.

Q. "Q. Yes, afterwards, certainly. A. Yes, and her brother."

Do you remember that? A. No, I don't remember that.

Q. Do you remember this question:

"Q. And her brother? I promise you that, sir. A. I'm sunk." A. I don't remember that, sir.

Q. You don't remember that? A. No, sir.

814 Q. You remember what you want to remember, isn't that true, Mr. Phillips?

Mr. Goodman: Now, if your Honor please, I respectfully submit that is argumentative and I must respectfully object.

The Court: Cross-examination; overruled.

Mr. Goodman: I respectfully except.

A. I remember what I can remember, sir, not what I want to.

Q. Would you tell us today on the witness stand,
815 Mr. Phillips, that you didn't kill Sunday Graham? A. No, I cannot say I did or I cannot say I didn't.

Q. Would you tell us today that you didn't rape her? A. I don't remember.

Q. Would you tell us today that you didn't rape her? A. I don't remember.

Q. Would you tell us today that you didn't rape her? A. No, sir.

Mr. Cahn: No further questions.

Mr. Goodman: That's all.

The Court: We will recess until tomorrow
816 morning.

Gentlemen of the jury, do not discuss this case among yourselves or formulate or express an opinion with respect to this case until after the Judge's charge and you finally deliberate in the jury room at the end of this case. You will refrain from reading any newspaper accounts of this trial or these proceedings during this recess and you will also refrain from listening to any radio broadcasts if such there be during this recess.

We will recess until tomorrow morning at 10:15 a. m.

(The trial was thereupon adjourned until 10:15 a. m., October 7, 1958)..

Mineola, N. Y.,
October 7, 1958.

Before:

HON. PAUL J. WIDLITZ,
County Judge,
and a Jury.

(Appearances as before noted.)

(Trial continued.)

(Roll call of Jurors.)

818

HAROLD ZOLAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

By the Clerk:

Q. What is your full name? A. Harold Zolan.
Q. Where do you live? A. 1534 Eric Lane, East Meadow, New York.

Mr. Goodman: May the record indicate, if your Honor please, that the purpose of the defense in calling Dr. Zolan is not to establish any defense of legal insanity within the purview of our laws and our statutes, but merely to aid the jury in determining the condition of mind and possible medical disturbance of the mentality and brain of the defendant, in aiding them in their ultimate determination. 819

Mr. Cahn: If your Honor please, I can't see any relevancy.

The Court: I will take it.

Direct examination by Mr. Goodman:

Q. Dr. Zolan, are you a duly licensed physician to practice medicine in the State of New York? A. Yes, sir, I am.

Q. For how long have you been so licensed? A. I have been licensed in the State of New York since 1948 and in the State of Illinois since 1944.

Q. Doctor, have you been trained and do you practice a specialty in medicine? A. Yes, sir, I do.

Q. What is that? A. I am a psychiatrist.

Q. For how long have you practiced that specialty? A. I would say approximately 13 or 14 years.

821 Q. Are you presently engaged in the practice of that specialty here in Nassau County? A. Yes, sir, I am.

Q. Where? A. In the Village of Hempstead.

Q. For how long have you been engaged at that point? A. For the past six years.

Q. Are you a member of a board or organization devoted to that specialty in medicine? A. Yes, sir, I am a diplomate of the American Board of Psychiatry, which is the board of examiners certifying specialists in psychiatry.

Q. For how long have you been such a diplomate? A. For the past eight years.

822 Q. Doctor, how old are you? A. 41.

Q. Would you be good enough to outline for us and particularly for the jury your medical education, training and experience? A. Well, I was graduated from the Chicago Medical School in 1943. Following graduation from medical school I served an internship at Beth David Hospital in New York City and then a residency in neuropsychiatry at the Goldwater Memorial Hospital also in New York City.

Following this I served in the armed forces for somewhat over two years, during which time I was a military neuropsychiatrist, and part of that time served as assistant chief of neuropsychiatry

service at the Army General Hospital, and also as psychiatric consultant to the post at which we were located.

I have also been on the staffs at the Marcy State Hospital at Marcy, New York, which is a state mental hospital; and also a staff psychiatrist at the Veterans Administration Hospital at Northport, New York. I have been the senior psychiatrist of Kings County Hospital and formerly an instructor in psychiatry at the Long Island Medical College.

824 I am a member of the Nassau County Medical Society, the New York State Medical Society, a member of the American Psychiatric Association, and a Fellow of the Association for the Advancement of Psychotherapy.

I am also an attending psychiatrist at Meadowbrook Hospital in Nassau County, an attending psychiatrist at the Hempstead General and Brunswick General Hospitals, both in Nassau County.

I am also associate professor of psychiatry in the graduate school at Adelphi College in Garden City.

825 Q. Doctor, at any time at my request did you conduct an examination from a psychiatric point of view of the defendant, Willard H. Phillips? A. Yes, sir, I did.

Q. Can you tell us where, when and for how long these examinations were so conducted by you? A. The examinations except for one short part were all conducted at the Nassau County Jail. The last portion was conducted here in the detention cell of the County Court.

I saw the defendant on the 7th, the 14th and the 28th of September of this year, and of course I saw him for a short period of time yesterday.

826 *Harold Zolan—for Defendant—Direct*

I would estimate that the total aggregate time spent in the examinations was approximately five hours.

Q. Can you give us an idea of some of the things that you did from a psychiatric and professional standpoint during the course of the examination of the defendant? A. Well, the examination as I conducted it was essentially a matter of sitting and talking with the patient, or with the defendant, and attempting to elicit from him
827 a number of factors and a certain amount of material that I thought or knew would be pertinent and relevant for my purpose in attempting to make a decision.

Also, there were some psychological tests done, but these were not done by me. Those were performed by a clinical psychologist.

Q. Were these psychological tests done under your direction if not under your immediate supervision? A. Yes, sir, they were.

Q. And is it true that even though you were not present thereat the responses on those tests were taken into consideration and evaluated by you in
828 your ultimate diagnosis? A. Yes, they were evaluated by me and supported or assisted me in the determination which I finally arrived at.

I think I should add, though, that the determination and the diagnosis can be made without the use of these tests. These tests were made merely for the purpose of eliciting additional information, but the diagnosis and evaluation of the patient can be made without the use of these psychological tests.

Q. Doctor, is it not true that in the course of these examinations you sought not only truthful responses to your questions, but also to observe

the reactions of your patient to various stimuli? Is that correct? A. Yes, sir.

Q. Has there been furnished to you a transcript of the entire testimony of this trial? A. All the testimony with the exception of the testimony which transpired yesterday morning. I have not seen that.

Q. Did you read all of the testimony of this trial with the exception of that which transpired yesterday? A. Yes, sir, I did.

Q. Were you present in court yesterday? A. I was present for the afternoon session. 830

Q. Were you present when the defendant, Willard H. Phillips, took the witness stand? A. Yes, sir, I was.

Q. And were you seated at the defense counsel table throughout his entire testimony? A. Yes, sir, I was.

Q. Did you observe his demeanor upon the stand? A. Yes, sir.

Q. Did you study his reactions and his answers? A. Yes, sir, I did.

Q. Did your observation of him upon the witness stand yesterday assist you in your ultimate diagnosis of his condition? A. Well, his behavior and demeanor and attitude on the stand yesterday did not vary particularly from his demeanor during the approximately five hours that I spent in examining him, so that I would say that it neither aided nor did it do anything else, for that matter. It was in conformity with his previous behavior. 831

Q. Well, now, would you say, then, that that substantiated the diagnosis which you had previously made with respect to his condition? A. Yes, sir, it did.

832 *Harold Zolan—for Defendant—Direct*

Q. Doctor, based upon your knowledge of the facts in this case as elicited from the defendant, your knowledge of the defendant's prior history as elicited from him and testified by him yesterday, and your other examinations, do you have an opinion which you can give with a reasonable degree of medical and psychiatric certainty as to whether or not the defendant was on May 12, 1958 and still is suffering from a recognized mental disorder? A. Yes, sir, I can give an opinion, and that opinion is that—

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Mr. Cahn: Just a moment. The answer is yes.

The Witness: I'm sorry.

Q. Before you give us your opinion, Doctor, will you give us the basis for your opinion? A. Well, the basis for my opinion is my examination of this man over a period of time and evaluation on my part of his longitudinal life history. That means the history from the time that he was very small to the present time, the behavior and attitudes that he told me about before, the behavior and attitudes during my examination of the patient, and of course the history of the crime itself.

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Q. Doctor, what is your opinion with respect to whether or not the defendant was on May 12, 1958 and still is suffering from a recognized mental disorder?

Mr. Cahn: I object on the ground of an improper foundation.

The Court: Do you mean what he found from subjective and objective findings?

Mr. Cahn: The jury is entitled to know, your Honor, what the basis of the opinion is,

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not just a general statement, and that is the reason for the hypothetical questions that are asked psychiatrists and all who give expert testimony, so that we know on what the opinion is based. They are entitled to know exactly what it is.

The Court: Well, we will get into that. I will permit this question. Answer the question.

The Witness: May I have the question again, please?

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(Question repeated by the Reporter.)

The Witness: The answer to that is yes. He was and still is suffering from a recognized mental disorder.

Q. Now, would you tell us what is this mental disorder, how it manifests itself and has manifested itself—

Mr. Cahn: I object.

The Court: Sustained as to form. Start over again.

837

Q. What mental disorder was in your opinion the defendant suffering from on May 12, 1958 and is now suffering from?

Mr. Cahn: Objection.

The Court: Overruled.

A. Technically it is known as sociopathic personality disorder. From a layman's point of view this would be considered a character or a personality disorder.

The nature of the disorder is such that in this kind of phenomenon, in this kind of mental phenomenon—

Q. May I interrupt you, Doctor, so that there can be no question about whether you are volunteering more than you have been called upon to volunteer? I will now ask you to please describe the disorder which you have diagnosed and its effects with respect to social behavior and self-control. A. Well, now, the form that this sociopathic personality disorder that the individual who is involved with a disorder of this kind manifests—he is a person in some instances very much
839 like an individual who is known as psychotic or insane, or an individual who is known as neurotic or emotionally upset. I say it would be like this, not similar to it in every sense. They are not the same thing or not to be thought of as the same. But the similarity lies in the fact that these people do have serious underlying—well, the great difference between people of this type and people who are known as psychotics or psychopaths is that instead of developing the same symptoms that you will see in some of those who imagine they hear voices or imagine they are being persecuted, or perhaps the kind of symptoms that a per-
840 son will see in a neurosis where people become tense or have other character disorders, you find numerous other personality traits and patterns of behavior.

These people are in many ways—these character disorders are in many ways similar, but the psychotic or psychopathic person does have antecedents or symptoms in their past history. Of course, much of this is in retrospect and we say, well, these things have happened in the past indicative that the patient was getting sick. There is an apparent beginning to his sickness or psychosis and there is a termination and an end. So that it is pretty well circumscribed and capsulated.

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However, with a character disorder it is very much as if individuals—well, there is no such thing as an apparent beginning and certainly, at least from our ability to treat these people thus far, there is no such thing as an apparent end.

So that these people are similar because it is more difficult to treat them and they are similar because at the time it is more difficult to recognize them. These are people whom we sometimes walk beside and say they are normal or we think they are not mentally sick as we know the mentally sick or insane person, and they are not psychotic as we know the emotionally upset person, but they have this sociopathic personality disorder.

842

As far as a judgment is concerned one of the outstanding characteristics of this type of disorder is that these people are possessed of extremely poor judgment or fail to possess sufficiently good judgment a good part of the time, or if they do possess good judgment they are unable to exercise this judgment properly, correctly and adequately.

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These are people who become the outcasts of society—referring to your question about social adjustment. These are the people who never seem to be able to fit. They are the square pegs in the round hole. They cannot ever seem to really grasp the idea that we as average members of society expect certain types of behavior from them. They are unable to accept the usual norms of behavior. They are people who attempt to rationalize this by saying that it is square or corny to be this way, to be the way society expects them to be; that they are happy; that they are different because they feel in a sense superior. Or, if they do not attempt to rationalize this or justify it they just say, I don't know, I can't understand it.

And it is their way of attempting to explain why in view of the fact that they apparently know what is the right thing to do and what is the wrong thing to do, they are unable to adhere to doing the right thing and refraining from doing the wrong. They are certainly in many instances average and above average in intelligence, and in our experience we find that there are some very brilliant people intellectually who are found in this category of mental disorder. But the mere
845 fact that they are possessed of a high intelligence still does not permit them to exercise sufficiently good judgment to carry out the normal activities which permit us to remain in society.

I'm sorry, I don't remember the last part of your question.

By Mr. Goodman:

Q. Self-control. A. Self-control? Yes. As far as self-control is concerned there is a particular group in this larger group of sociopathic disorder that I have mentioned that is known as impulse disorder. And by this we mean that these are
846 people who are subject to and overcome by sudden surges of impulse. In some cases they are sexual in nature, in other instances they are self-destructive in nature. In other cases still they are homicidal in nature.

Now, I am not implying that everybody who commits suicide or attempts to commit suicide belongs in this group, nor am I attempting to imply that everyone who commits murder belongs in this group. But certainly all of the sexual deviants, the people who commit rape and other aggressive sexual acts, they certainly belong in this group.

These are people who are overcome by impulse —and I use the word overcome advisedly. They

are truly overcome and are totally and completely incapable of controlling the impulse. They know at the time they are committing whatever act they are committing—they are aware that that is wrong, but actually the consideration of rightness and wrongness simply—at the time of the act, whatever the act is, that simply does not enter into it.

These people are so completely overwhelmed by impulse that there is absolutely no control whatever, and of course this is one of the outstanding 848
characteristics of the impulse disorder. That these people are overwhelmed by the antisocial or asocial impulse and have no capacity for controlling it.

And of course a significant thing is that these people very often repeat. They do these things over and over again and when the act is finished, then whatever act they have committed is finished they have a certain letdown from a state of tension and some of them may even say to themselves that they don't know why they did this and wish that they had not done it; that they 849
don't understand this, and often they will promise never to let it happen again.

Now, of course not all of them show this; some just brushing it off and forgetting it, but regardless of whether they have forgotten it or remembered it or whether they have promised themselves that they will never repeat this again, the next time there is the surging of this impulse the act is repeated again, there is no control available.

And it is rather significant that the fact that they are in danger, the fact that they may jeopardize themselves as a result in arrest and punishment makes no difference, and they do—the

recollection of the punishment does not affect subsequent behavior of the same type.

Q. Can you now, Doctor, particularize this disorder with respect to the defendant Phillips; tell us how it is that you come to this conclusion in so far as he is concerned and how you feel this disorder has manifested itself in him. A. Yes.

Q. Before you do may I interrupt. Would you care to refer to your notes to refresh your recollection? A. I think I can probably recall what I need. If I should have to refer to them I can ask
851 for that later.

Q. Do you have them, Doctor? A. I believe they are at the counsel table in the briefcase. The basis for placing the defendant in this group of mental disorder arises from my examination and discussion with him of all of the things—not all of the things, of course, but many of the pertinent things from my point of view which have occurred during his lifetime.

Now, included in that were the facts that during his early life there were or there was no firm basis for any kind of adult relationship, a close adult
852 relationship. I mean mother and father and that sort of thing. He was apparently if not abandoned at least left with someone other than his mother and father shortly after birth.

Then in discussing his sex history with him I learned that he had begun to have sexual relations at about 11 or 12 years old. This is, if not abnormal, certainly unusual. The average individual doesn't began what is apparently adult sexual life at age 11 or 12.

I then discussed with him the nature of the sexual activities from the beginning and I learned that among other things he had had a number of homosexual episodes which means that he had

had sexual relations with a member of the same sex.

Now, at age 11 or 12 although this is still frowned upon and not considered desirable, it could possibly be regarded as the sexual curiosity of small children. Ordinarily, though, sexual curiosity does not extend to that extent.

However, he has had at least one homosexual episode past the age of 11 or 12 when he was older, in his teens, I believe.

Then, in discussing with him his sex life further I asked him whether he was able—whether 854
it was possible at all for him to tell me how many women—with how many women he had had sexual relations. This was entirely impossible. He wouldn't even attempt to estimate. I didn't ask for an exact number. I said to just give me an estimate of how many and he was entirely unable to do this.

In discussing with him his sexual activity with the woman who had been his second wife, a Mrs. Graham—I am sorry; her name, I understand, now is Mrs. Graham—he told me that he had no exact way of establishing how often but he knew there 855
were times when for days in a row he and she would have sexual relations four and five times a day for several days at a time, and a couple of days might go by and they wouldn't have any, and then they might have it once or twice for the next few days.

In then discussing other aspects of his sex life with him I asked him whether he had had while he was married to Mrs. Graham—whether he had ever had sexual relations with other women and he said yes, he had; and also in attempting to determine the number of women again this again was impossible.

We then got to the time of a crime for which he was convicted in, I believe, 1946, and I discussed his sexual feelings at the time, and I would like to modify at that time—I discussed his feelings at the time, and the time I am referring to is the time that he was in a car driving from Hempstead to Great Neck. At the time he indicated that he had been at that period of time having sexual relations with Mrs. Graham. I asked him whether these relations were satisfactory and he
857 indicated that they were eminently satisfactory, that the two of them were highly compatible sexually and both were mutually satisfied sexually.

Then I asked him specifically about his feelings at the time that he was in the car driving past this golf course in Great Neck and I asked him whether he had been thinking about anything sexual, whether he had any sexual feelings or needs at the time and he indicated that he hadn't, that there hadn't been any particular sexual thought. This was before he saw the girl walking on the golf course. However, when he saw the girl walking on the golf course he got this sudden upsurge of
858 sexual feeling, and, of course, proceeded to forcibly have sexual relations or attempt to have sexual relations with her. This was an example of what I referred to earlier as a sudden overwhelming impulse which had to be carried out.

The next aspect of the sexual behavior that I discussed with him was an episode which occurred in Levittown I think about five or six years later. This was in relation to a five-year-old girl whom he had molested, and in questioning him about this I learned that he shortly before the molestation occurred that been wiping paint. He was painting this house or helping to paint it, and he was wiping paint off the slates which formed the front

walk of the house. Apparently they had dripped some paint and he wanted to be sure that there was none left on the slates. He was bending over, certainly not thinking of any sexual thoughts, according to him, and then as he approached the door—apparently he started from the front of the walk and approached the door—and as he approached the door the little girl opened the front door and stepped out and asked what he was doing and he said that he was—I don't recall now whether he said he was painting the house or wiping some paint. I believe he said he was painting 860
the house. And she said, "No, you are not, you are wiping some paint," and he said, "You had better step out of the way because you will get covered with paint," and she was apparently a very short distance from him and he reached out, he says, in an effort to push her out of the way. Now, whether this was actually an effort to push her out of the way or whether this was an impulsive attempt to touch her genitals I am not sure, but I feel that it was not merely to push her out of the way. I think he merely experienced the impulse to touch the genitals of this small child, 861
and of course he did it.

This, again, was something which just occurred right at the spur of the moment. Further discussion of the sexual behavior and sexual activities in this discussion I asked him whether the attempted rape in Great Neck and this rape of which he has been accused currently were his only experiences of this kind and he said no, that he had a good many before, and, in discussing this with him I asked him could he tell me how many times he had raped women and he was unable to tell me, but this had occurred many times.

I attempted to determine by offering a number. I said, "Well, was it as many as fifty times?"

He didn't think so. I asked him, "Was it more than twenty-five?" and he felt that it was somewhere between twenty-five and fifty but he wasn't certain. I asked him about this type of sexual activity and he indicated that he would sometimes plan to do this—I mean plan in the sense that he would date a girl and take her out and other times he would simply be overwhelmed with the need to do this.

I asked him whether this was wrong, did he think that having this type of relationship was
863 wrong, and I didn't feel that I had gotten a really clear-cut answer but he did say, well, he wasn't so sure that this was wrong, he felt that the amount of force necessary might determine whether it was wrong, but he felt that a certain amount of force was expected by women, that women expected to have to be overcome. But, in general, he felt that holding a woman down and forcing himself upon her was not wrong.

I mentioned earlier in discussing this type of individual that at times they know the difference between right and wrong and other times it is
864 merely a matter of the rightness and the wrongness simply not entering into the act itself. And this is one instance in which the rightness and wrongness simply doesn't seem to play a part in it.

Actually, I got the impression from speaking with him about this particular type of activity that he regretted the necessity for this sort of thing but didn't think that there was anything wrong about it. The aggressive aspect of this behavior which, of course, is so characteristic of many of the impulse-ridden disorders, the aggrestive aspect of it did not seem to be especially reprehensible or abhorrent.

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Further discussion with him led to a discussion of the crime, the crime for which he is being tried at this time, and he explained that he had been riding down the street in Hempstead and had been accosted by this child who called him, that in the process—she called him and she asked him would he take her home. He finally consented to do this, and in the process of doing this she prevailed upon him to buy her some ice cream which he did. Also during this ride, according to the story which I got from him in my discussion with him, the child mentioned that her mother had told her 866 that she no longer wanted to see him.. He indicated that he was surprised, he didn't understand why this should be so, and attempted to question the child further to determine whether or not this was true or not.

He attempted this for some t[illegible] apparently she continued to evade his c[illegible]s and constantly reiterated that her moth[illegible] was not going to see him, and so on. He indicated that there was a building state of tension, a rising state of tension. He was upset and he was anxious and he impulsively slapped her on the face because of 867 his annoyance with her.

At this time she began to cry and indicated that he didn't love her any more, that she felt this impulsive slap indicated that he didn't love her. He then attempted to reassure her, to get her to stop crying. He pointed out to her that he was upset, that he didn't mean to hurt her, that he didn't mean to strike her, that this was just an accident, and she said no, no, she was convinced that he no longer loved her.

He attemted to console her for some period of time and then he stated that he felt that the ap-

proach that he had been taking to get her to quiet down, to be consoled and to stop crying, was apparently not being effective and he decided that perhaps the best way to do this, to stop her from crying, would be to frighten her, to scare her or to shame her and he then stated that he told her that he was going to play with her pocketbook if she wasn't quiet. He knew and he knew that she knew that her pocketbook was an expression used by her mother and by him and the child, too, to refer to her genitals.

869 He then climbed into the back seat of the car and dragged her back into the back seat with him and proceeded to do just that. Now, I asked him about his sexual feelings during this and he indicated that there had been no sexual feelings up to the point where he had begun to manipulate her genitals, and then she began to resist. I don't recall whether I had mentioned before, but this type of individual of an aggressive sexual character disorder apparently finds it necessary as part of his act to overcome resistance. After all, there are very few of these people who simply couldn't

870 find some other means of sexual outlet. Many of them, for example, are married or have girl friends as this man did. Certainly, there are other means which are available in our society for sexual expression, but this individual, of course, is not concerned with planning a sexual type of outlet, seeking the result of a logical sequence of thought or feeling, and then at the conclusion of this feeling going out and looking for it.

The Court: We will take a five-minute recess.

Gentlemen, do not discuss this case amongst yourselves while you are in the jury room.

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(A short recess was thereupon taken.)

(After recess.)

The Witness: May I have the last two sentences reread? I lost my train of thought.

The Court: Read the last two sentences.

Mr. Goodman: Before you do, Mr. Stenographer, might I respectfully suggest, if your Honor please, that the jury be invited at any time if they don't hear the witness to speak up and we will try to persuade him to speak louder.

872

The Court: All right. Go ahead, read the last two sentences.

(The last two sentences referred to were read by the stenographer.)

A. (continuing) So that this sort of individual has as a specific characteristic—

Q. Doctor, will you try to speak a little more loudly. It is difficult to hear back here. A. This sort of individual has a specific characteristic of his personal disorder that the behavior is of an aggressive, impulsive type and they apparently respond by becoming more excited when resistance occurs.

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So that returning to the original discussion of the crime there was apparently no sexual feeling until the time when this child began to resist. I asked him then did he intend to have sex relations and he stated that he didn't know, but that he placed himself on top of this child and the next thing he knew he experienced a shock. I asked him what did he mean by a shock, what sort of shock, and he stated that he wasn't certain but he felt that the shock was the sexual climax which he had experienced.

He then stated that he sort of came to and realized that he was lying on top of this child. He saw that she had her pants stuffed into her mouth and that one of his hands was holding the end of the belt which was around her neck. He then placed or relinquished the end of the belt and sat up in the back of the car, sat up on the seat of the car and just sat there in a sort of daze.

After a few minutes he then said to her, "Come
875 on, Sunday, it's time to go home."

I would like to call attention to this sort of daze that he referred to. This daze actually is a state of released tension which most of these people experience after there has been a build-up and a forceful, violent destructive expression of this aggressive impulse, there is a letting down and in the letting down there is a general physical and mental release.

In discussing what he did after he found that the child was dead, he told me that he had again driven a rather circuitous route and finally wound up at a building which housed the offices of a
876 floor waxing concern. I asked him then where was the body of this child and he indicated that the body was on the back seat of the car. I then suggested to him that if this were so then it would have been very simple for someone to pass the car and see this inert form—wasn't he concerned? Wasn't he worried that he might be apprehended? And he indicated that he really didn't care what happened, what he wanted really was for somebody to find this body; and this seemed like a rather strange statement and I asked him to explain why he felt this way and he indicated that he felt he wanted to be caught.

He wanted someone to find the body. I asked him why then didn't he take this to the police or notify the police or why didn't he notify the mother or do something to indicate that this had occurred, and he indicated that he just didn't know but he felt that he should be stopped, there was something wrong, and that this should be found, that he should be stopped.

He then went to the office where he had this appointment, and if my memory serves me correctly, spent the greater part of an hour filling out and having a form filled out for him and also 878 answering questions in an interview with the manager of this company. There is nothing to indicate that this man appeared other than usual or average to these people. Certainly he was able to go through approximately an hour of questions and answers at a time when he had killed a child, and knew that this child was dead, and yet the average individual who was confronted with a situation like that, like for example if he had killed someone by accident or for some other reason, certainly would have been terribly upset, terribly distraught. This man was able to spend 879 almost an hour answering questions, routine questions about himself.

In further discussion about what he had done later, it came out at a later time—I believe it was the following day—that he assisted in searching for this child. Now, here is an individual who knew he had committed a crime, knew he had been involved with a crime who went out by himself and looked in school yards—and, according to his testimony in court yesterday, he indicated that when asked what was he doing, why was he doing this, he stated that he was looking maybe hoping that he could find her.

Now, here is a man who knows this child is dead. He knows that he is responsible for her death, and yet there is such a degree of mental dissassociation, such a degree of separation of thinking and feeling, such a need to deny even to himself that this has occurred, that he even thinks to himself maybe he will find her.

Now, in this group of disorders there is a tendency to believe that these people generally do not show any remorse for their acts. Now, in some great measure this is true, but it is not uni-
881 versally true. I say that because we generally measure remorse in the ordinary ways, the way a normal individual would express remorse. They would be sorry and they would be sad and they would be apologetic. This person had in a way expressed some form of remorse, but entirely differently than the average individual does. Remember, he doesn't do anything or many of the things that he does are not like the behavior of ordinary people so that he, attempting to express remorse in a vague, disorganized sort of way, sort of pretends to himself that by going out
882 and looking for this child and maybe hoping to find her that he can sort of undo this act.

In reference to this individual's awareness that he was doing wrong in reference to his ability to withhold himself, to prevent himself from doing wrong, I discussed with him his feelings about whether he felt he was sick, did he feel that he needed any help, and he said yes, he felt that there must be something wrong.

Now, he went on to indicate that certainly normal people don't do this kind of thing, don't do the sort of things that he has done over a period of years. Now, in this sort of person—

in this sort of patient—there is a distinction made between their ability to understand things and their ability to feel them. Now, these people understand things. They, as I have said, a number of times very often know the difference between right and wrong. This man knew, for example, that he was sick. He knew that he had committed a number of crimes on this basis some of which he was apprehended for and apparently others, many more, for which he was not apprehended.

884 He knew, for example, that while he was in prison that he had been seen by doctors who told him that he needed some help of this kind, and all of these things are part of his intellectual knowledge, part of his intellectual awareness. Yet, when he left prison and knowing full well that he had this disorder, that he had been told that there was something wrong, there was nothing on the part of his feelings, no real deep-seated need to avoid these things, no regrets, no fears such as the normal individual might have that he might do this sort of thing again.

885 Many times we find people will commit what is regarded as a criminal act because of some emotional disturbance and they will seek help. This man did nothing about seeking help because once the discharge of tension occurs there is a letting down. It is almost as if it doesn't exist any more, and then there is again at a future time a building up again of this tension, of this aggressive feeling and there is an explosive discharge and then again there is a letting down, so that this is a periodic, episodic kind of disorder and during the intervals there is no appreciation, no awareness or an unwillingness to be aware that there is something wrong.

886 *Harold Zolan—for Defendant—Direct*

It is on the basis of all of these things that I have told you just now that I have come to the conclusions as regards his diagnosis.

Q. Doctor, have you an opinion which you can state with reasonable degree of medical certainty as to whether or not the crime for which this defendant stands charged was a product of the disorder which you have described? A. Yes, sir, I believe that it was a product of that disorder.

Q. Can you tell us whether or not it is medically and psychiatrically true that when the emotions
887 and the intellectual run at cross purposes that that is an indication of mental disorder? A. Well, very often, of course, in many normal people we have a running of cross purposes of the intellectual faculties with the emotional faculties on the other, but in such instances in which an individual knows better, indicating the intellectual faculties, who knows better, on the abstract basis if he is asked, "Is this the right thing to do?" when such an individual is subjected to too severe emotional pressures to such an extent that he is unable to prevent himself from carrying out his impulses
888 even though knowing that he may hurt somebody else and may hurt himself—or may hurt himself —then certainly this is a mental disorder.

Q. Is it your opinion that during these episodes Phillips was suffering from the absence of emotional and volitional control? A. Yes, sir, he was.

Q. And is it your opinion that that, too, is symptomatic of the diagnosis that you have made? A. Yes, sir, it is.

Q. Is it true, also, that he was during these episodes intellectually aware that something was wrong but emotionally it didn't have the same

consideration of wrongness to it as would apply to a normal person? A. That is correct.

Q. Have you an opinion, Doctor, as to whether or not the defendant was at the time of this particular act in crime dominated by his instinct, his emotions and his unconscious or subconscious mind? A. He most certainly was.

Q. Is it your opinion, Doctor, that he was motivated by an irresistible impulse? A. Yes, sir.

Q. Are these symptoms known and recognized to the profession of psychiatry? A. Yes, sir, they are. 890

Q. Is it your opinion that the condition which you have described with respect to this defendant, is a condition of long standing? A. Of very long standing.

Q. Doctor, in common parlance, is it not true that all of which you have told us about Phillips merely means that he is what to the layman is a sex fiend? A. Well, of course, we don't use this kind of terminology, but I think that this is essentially what the layman thinks about as a sex fiend or a sex maniac. 891

Mr. Goodman: You may inquire.

Mr. Cahn: At this time, if your Honor please, you gave us a very short recess before and I will need about ten minutes before I cross-examine the doctor.

The Court: Come up for a minute.

(Conference at bench not within hearing of stenographer or jury.)

Mr. Goodman: I have one or two questions of the doctor, if you don't mind.

The Court: All right.

892 *Harold Zolan—for Defendant—Cross*

By Mr. Goodman:

Q. Doctor, there were two questions that I had overlooked. Is it true that you are being paid for your services in this case? A. Yes, sir, it is.

Q. Is it also true that your fee is being provided by the County of Nassau? A. Yes, sir, I understand so.

Q. Because the defendant is an indigent prisoner? A. I understand it is being provided by the County, right.

893 Q. Doctor, based upon all of your tests and your observations and your diagnosis, have you an opinion that you can state with reasonable degree of medical and psychiatric certainty as to whether or not the defendant with premeditation and deliberation at that particular time caused the death of Sunday Graham? A. It is my opinion that there was no premeditation involved in this at all. This was an impulsive act.

Mr. Goodman: Thank you.

The Court: We will have a ten-minute
894 recess. Do not discuss this case among yourselves until you finally deliberate in the jury room.

(A short recess was thereupon taken.)

(After recess.)

Cross-examination by Mr. Cahn:

Q. Dr. Zolan, sir, when you first saw Willard Phillips I assume you introduced yourself to him? A. I was introduced to him by Mr. Goodman.

Q. You were introduced by Mr. Goodman? A. That's correct.

Q. And is it not a fact, sir, that Mr. Phillips knew that you were the psychiatrist engaged by Mr. Goodman to aid in his defense? A. I believe he knew that, yes.

Q. Well, did you tell him that? A. I was introduced to him by Mr. Goodman. I didn't identify myself any further than that.

Q. You didn't tell him you were a psychiatrist? A. No. Mr. Goodman told him that.

Q. Well, did somebody tell him in your presence, Dr. Zolan, that you were the psychiatrist engaged by Mr. Goodman to aid in his defense? A. That 896 may or may not have been said, but I don't recall just what the exact words were. I do know that I was brought in, I was introduced to Mr. Phillips.

Q. I can't hear you. A. I was brought in and introduced to Mr. Phillips by Mr. Goodman.

By the Court:

Q. Mr. Goodman brought you in to help him in the defense of the defendant? A. Yes.

Mr. Goodman: I will concede for the 897 record that Mr. Phillips was told that Dr. Zolan was brought in for that purpose.

Mr. Cahn: Thank you, sir.

The Court: Go ahead.

Q. Now, Doctor, you gave an opinion that the defendant was suffering from I believe you said, if I can find the word, an asociopathic personality. A. A sociopathic personality disorder, that's correct, a sociopathic personality disorder.

Q. Is this another term, Doctor, for psychopathic personality? A. The term psychopathic personality was at one time used to include a

898 *Harold Zolan—for Defendant—Cross*

number of different conditions of which sociopathic personality disorder is one.

Q. Now, Doctor, isn't it a fact, sir, that asociopathic personality is not a mental condition but a behavior condition? A. It is a condition or a disorder—

Q. Doctor, if you will please—Mr. Goodman is here. If you can answer my question yes or no I would appreciate it, sir. A. Yes, it is, it is considered a behavior or character disorder.

899 Q. And it is not a mental disorder? A. No, I didn't say that. I didn't say that. If I may elaborate I will.

Q. If you need elaboration, Mr. Goodman is here for that purpose. A. All right.

Q. It is a behavior disorder? A. Correct.

Q. Is it a mental condition? A. It is part of a mental condition, yes.

Q. Doctor, isn't it a fact that such asociopathic personality can develop into a mental condition, but in and of itself, sir, is not so considered? A. A sociopathic personality disorder is considered a mental condition and as such these people

900 are subject to developing a psychotic reaction, a form of insanity.

Q. And is it not a fact, sir, that only when the psychotic condition develops is the asociopathic personality considered a mental condition? A. No, it is not.

Q. It is not? A. No.

Q. Well, now, I believe you stated and maybe not in these words, sir, but more or less that one who has asociopathic personality is one who continually violates let us say the written and unwritten law regardless of the number of times that he is punished? A. The essence of that is

what I said, but I don't think I used the word "continually". I said very often it may be episodic and sporadic.

Q. Well, the chronic thief, Doctor Zolan, the man who steals rather than work, who gets caught, serves his term in prison, comes out, steals again, gets caught, serves his term in prison, gets out, steals again and is back in prison —he is asociopathic personality, is he not? A. Well, of course, you are asking me to generalize about someone about whom I don't know. I can't 902
make a diagnosis on the basis of a history of this kind without knowing the patient and examining him myself; but, on the other hand, in a very general way—and this is what you have asked me to do, is to generalize—it seems to me that anyone who does this kind of thing is simply not normal mentally.

Q. That is not my question, Doctor. Isn't it a fact, psychiatrically speaking, that one who commits a crime over and over again regardless of punishment is psychiatrically speaking considered an asociopathic personality? A. He could very 903
well be.

Q. I have been corrected in my pronunciation. I have it down as I thought you said "asociopathic"; or is it just sociopathic? A. Sociopathic.

Q. Thank you. Therefore, Dr. Zolan, the prisons are full of sociopathic personalities, are they not? A. They most certainly are.

Q. And it is true, Dr. Zolan, that these people have full contact with reality at all times, is it not? A. Which people?

Q. Sociopathic personalties without psychosis. A. Sociopathic personalties without psychosis have full contact with reality.

Q. It is not your contention here, Doctor, as I understand it that this defendant has any psychoses? A. No.

Q. He has not? A. None.

Q. And, therefore, in full contact with reality at all times, is that correct, sir? A. At all times unless they develop a psychosis.

Q. Unless they develop a psychoses? A. That's right.

Q. And we are not talking about any psychoses here? A. No.

905 Q. They knew what they are doing? A. Generally.

Q. And they know what they are doing if it is wrong that it is wrong? A. Well, generally. I wouldn't say that this is entirely true, but very often it is, very often.

Q. Now, Doctor, you stated that everyone who commits a rape— A. I am sorry?

Q. I believe you stated on direct examination, sir, that everyone who commits a rape is a sociopathic personality. A. I don't recall exactly saying that everyone who commits a rape is, but I

906 would say that everyone who commits a rape has this, especially if it is on a repeated basis, has this aggressive drive which they are unable to control properly.

Q. Now, Doctor, I would like to make myself understood. I don't believe you answered my question. A. I will try.

Q. Did you or did you not state on direct examination, sir, that everyone who commits a rape is a sociopathic personality? A. I don't recall testifying that everyone who commits a rape is.

Q. And if you did, sir, that is incorrect? A. An individual who commits a single—

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Q. No—if you did state that on direct examination is it correct or is it not? A. If I stated that on direct examination that an individual who commits a single rape is a sociopathic personality, I did not intend to convey that impression and I do not feel that it is necessarily correct.

Q. Now, you said you examined the defendant Willard Phillips. A. Yes, sir.

Q. And on the basis of certain things—on the basis of those things you arrived at your opinion? A. Yes, that's correct.

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Q. And if I may ask you, sir: These were the things which the defendant told you? A. Yes, generally speaking.

Q. Did you make any independent investigation to determine whether or not what the defendant told you was true? A. Well, I didn't make any independent record of it, but I assumed it was a matter of public record that this man had been convicted of rape and had been returned from parole.

Q. You assumed that? A. Yes.

Q. Did you make any effort to determine whether or not it was so? A. No.

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Q. Did you make any effort to determine if you could or did you ask Mr. Goodman to get the record of that previous trial so that you could read it? A. No.

Q. Did you make any attempt in any other way, forgetting now the last case which was a matter of public record, did you make any attempt any other way to determine what the defendant told you was true—whether or not it was true? A. No, I didn't make this attempt and for a reason that I considered to be adequate.

Q. Then may I ask you, sir, did you accept what the defendant told you as the truth? A. I accepted some things and didn't accept others.

Q. Well, I think, Doctor, I would like to know what you accepted as true and what you accepted as false. A. Well, as far as truth was concerned, I accepted as true the fact that this man when he told me that he had been arrested and tried for rape and had been convicted and had spent ten years with a break between those two periods in
911 prison, I accepted that this was true.

Q. Why? A. I accepted that it was true that he had molested a child in Levittown. I accepted that was true that he had over a period of years had had innumerable sexual experiences and that a number of these were of a forceful nature; and, I accepted these things as true because I feel that a normal person doesn't do this sort of thing and that this individual or no individual who has done this sort of thing is going to go around claiming that he has been sent to prison for rape.

Q. May I ask you again why you accepted the
912 fact that the defendant had innumerable sexual experiences as true. Why did you accept that as true? A. I hadn't said why I accepted. I was merely referring now to the prison term and the rape. As far as the other is concerned—

Q. This particular portion, Doctor, did you accept the fact that he told you that he had innumerable sexual experiences, many of which were rapes. Did you accept that as true? A. Yes, I did.

Q. On what basis did you accept that as true, sir? A. On the basis of the fact that this man had actually committed an overt rape.

Q. Well, am I given to understand, Doctor, that because of these things this is one of the consid-

erations you had in mind when you pronounced him a sociopathic personality; and then tell me that because he is a sociopathic personality you accepted it as true? A. I am sorry; I don't follow that question.

Q. You told me that one of the reasons that you arrived at your opinion that he was a sociopathic personality was that because one of the considerations was that he told you he had committed—he had innumerable sexual experiences. A. This was one.

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Q. And many of those sexual experiences were rapes? A. This was one of the considerations.

Q. Yes, one of the considerations. And I asked you, sir, why you accepted that as true. A. Well, frankly, I saw no reason to think differently.

Q. At that time? A. Or any other time.

Q. Well, let me ask you, sir: If you learned the man was a liar would you have reason to think differently? A. To think differently about his being a sociopathic personality?

Q. No, think differently as to whether or not that statement was true. A. I would have to learn that he was a liar about that statement.

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Q. About that particular statement? A. Yes.

Q. Well, what effort on your part, Doctor, did you make to determine whether or not that statement was true; whether or not he was a liar about that particular statement? A. Simply speaking with the individual which is a part of the tools of the psychiatrist. The psychiatrist must use these tools to evaluate people whom he is examining.

Q. Well, let us go to a different point. He told you, sir, did he not, that he went to Mineola and filled out a form. A. Yes.

916 *Harold Zolan—for Defendant—Cross*

Q. While Sunday Graham laid dead on the back seat of his car? A. Yes, sir, he did tell me that.

Q. Did you accept that as true? A. I accepted that as being possibly true.

Q. You are hesitant about that particular statement? A. Well, I accepted it as being true at the time that he told it to me, and since this was an actual event which had occurred, I was accepting it without knowing whether it had occurred or not. This child had been killed and she had been
917 —her body had been on the back seat of the car, and of course, he had disposed of the body. He told me that it was on the back seat prior—I mean during this interview. It might have and might not have, but at the time I accepted that it was.

Q. And you accepted it at that time as true? A. Yes.

Q. Do you have any doubt about that statement now? A. I see no reason to doubt it.

Q. Well, if I told you that he told the police and the District Attorney represented by myself that he had disposed of the body before he went
918 to Mineola, would you have any doubts about that statement as being true? A. I would wonder why the two stories varied.

Q. And would it be possible in your experience, Doctor, that the two stories varied because he was trying to save his neck? A. I can't quite see how telling a different story would save his neck.

Q. To develop a sociopathic personality. A. Well, if that were true, I would have to credit him with education in psychiatry, and I am not familiar with his background in that field.

Q. You gave him psychological tests at your direction? A. I did not give them to him, but they were given.

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Q. I understand Dr. Levine gave the tests. A. ght.

Q. Did you know, sir, that he was given those ts before? A. Yes.

Q. And those tests, am I not correct, Doctor, wed him to be of superior intelligence? A. you mean the tests that were given by me or ny direction?

Q. Psychological tests given. A. At my di- tion?

Q. Yes. A. No, they were not.

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Q. What intelligence quotient did he have? A. had an intelligence quotient of 111 which is bright normal category.

Q. Above average, is it not? A. Yes.

Q. Well, now, did you know, Dr. Zolan, at the ie you questioned the defendant that he had nied his guilt for approximately sixteen hours? I believe I did.

Q. And does that coincide with the statement t he made to you which you testified to, that wanted to get caught? A. You mean does it ostantiate that statement?

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Q. Does it coincide with that statement? A. the surface it appears not to be, not to coincide.

Q. Now, sir, you also said that the defendant presses remorse in a vague sort of way, per- ning to looking for her. That is the time he d you he went looking for Sunday Graham? Yes.

Q. By the way, if I may interrupt my ques- n and ask you: At any time while you were estioning him, Dr. Zolan, other than in this urtroom, did he tell you that he thought he uld find Sunday Graham? A. He didn't say

that he thought he would find her. He told me that he went out looking for her.

Q. Yes? A. Yes.

Q. And I think you said that expressed remorse in a vague sort of way, that sort of thing. A. Well, remorse in the sense that this was a desire to pretend to himself that this whole thing had never occurred.

Q. Well, now, Dr. Zolan, isn't it at all possible that he was doing this to cast off suspicion from himself? A. I suppose that possibility exists. I
923 wouldn't know.

Q. And is it not more probable in light of the fact that he denied his guilt for sixteen hours rather than as an expression of remorse? A. Well, all I can say is that he obviously denied his guilt for sixteen hours.

Q. Yes, we know that, sir. A. Now, as to his probability in terms of throwing off guilt, I am sure I don't know.

Q. You don't know? A. No.

Q. Well, from your experience, Doctor, and from your background which I admire—I will
924 withdraw that and ask you this question, sir: Would you say that before he confessed, the making of the sign of the cross and then thereafter asking to see a priest—would you say that is an expression of remorse in a vague sort of way? A. No. This is not an expression of remose necessarily. It may be an expression of his need to be helped by some divine being to whom he is praying. I don't know that that would necessarily be categorized as remorse at all.

Q. You don't think that would be categorized? A. Not necessarily. It might, but there are other possibilities that might enter someone's mind.

Certainly people cross themselves frequently and they are not always doing this because of remorse.

Q. Well, if I told you the statement which he made to me indicates that he did so just before he started to confess, would that indicate anything to you? A. It might indicate that he was seeking divine help in some way.

Q. And if I told you I asked him this question and he made this answer:

"Q. You made the sign of the crucifix, did you not? A. Yes, I said a little prayer.

"Q. And you said a little prayer because you knew you did wrong, did you not? A. Yes." 926

Would you say, sir, that would indicate some expression of remorse? A. It might indicate a sense of remorse. It might indicate awareness that he knew he had done wrong which I don't think is questioned and he was simply seeking divine guidance.

Q. There is no question about the fact that he knew he did wrong, Doctor? A. I don't think there is any question.

Q. There is no question about the fact that he knew what he did? A. None whatever. 927

The Court: Anything further?
Mr. Cahn: Yes, Judge.

Q. Now, let us go back to this no firm basis for adult relationship. This is a result of the story that the defendant told you about his early childhood? A. Yes.

Q. There is no way of knowing whether that is true or untrue? A. I have no way of knowing about many of my patients, whether what they tell me is true or untrue. Therefore I must evaluate this on the basis of my experience.

Q. You have no way of knowing whether that is true or untrue? A. No. As a matter of fact, no.

Q. Now, he began sexual relations at 11 or 12, he told you? A. Yes.

Q. You have no way of knowing whether that was true or untrue? A. Knowing it as a matter of fact by having been there, certainly not.

Q. But taking it as a matter of fact now, Doctor, what does it indicate? A. It simply indicates a
929 precocious sexuality, excessively early interest in sex.

Q. That's all, isn't it? A. Well, I don't take it as a matter of shrugging it off and saying that's all. Precocious sexuality is not necessarily considered average or normal, I believe.

Q. By whose standards? A. The standards of society.

Q. And different societies have different standards? A. Yes, but we are living in this society, of course.

Q. Now, you mentioned some homosexual activity. A. Yes.

930 Q. I believe the defendant testified on the stand that he had homosexual activities at the age of 10 and 11. That is a very common thing at that age, is it not? A. I believe I already testified—

Q. I understand, sir, but please don't get angry at me for questioning you. I have my job to do. A. I'm not angry at you.

Q. I know you have stated a lot of things that I am going to ask you about, but that is the purpose of cross-examination. A. Yes, it is a fairly common thing. I wouldn't say that the majority of children practice it or I wouldn't even say a large proportion of the children do, but it is I guess fairly common.

Q. At that particular age? A. Yes.

Q. From what I can remember of my high school and college sociology that is more or less the homosexual stage of the boy, where they like to play with boys rather than girls. A. Of course, that is a normal homosexual period, but this does not imply, of course, that all growing adolescents go through the normal homosexual period actually indulging in relations of a homosexual nature. But of course it does occur in a certain percentage of children.

Q. He told you that he could not estimate the 932
number of women with whom he had had sexual experience? A. That is true.

Q. Is this unusual? A. Well, I think for an individual to be unable to even estimate is probably unusual.

Q. You say "probably." A. Yes. It is unusual, certainly.

Q. You think it is? A. Yes.

Q. Could it be that he just didn't want to estimate? A. Well, that could be, certainly.

Q. Now, the fact that he had extramarital relations, would that alone, Doctor, indicate a socio- 933
pathic personality? A. No, certainly not.

Q. Now, he told you that in this last case he was driving a car and he didn't have sex on his mind. Isn't that correct? A. Yes, that is correct.

Q. And that he saw this girl walking along the golf course? A. Yes, he told me that.

Q. It was in the month of November. Did he tell you that? A. He may have, but I don't remember.

Q. Well, did you hear it yesterday? A. Yes, I believe I did.

Q. And that it was between 5 and 5:30 in the evening? A. I heard that in court yesterday.

934 *Harold Zolan—for Defendant—Cross*

Q. Well, now, forgetting what he told us in court, Dr. Zolan, what did he tell you happened? A. He stated that he was driving past the golf course and saw this girl and when he saw her he suddenly had the impulse to have sexual relations.

He left the car and walked up to her and asked her for some directions—directions about getting to a street which I imagine is nearby. In fact, if I am not mistaken I think he mentioned the name of the street, but I don't remember.

935 But in any event, as she turned to point out or indicate, he grabbed her and attempted to have sexual relations with her.

Q. Did he tell you he ran around to go into another entrance so that he could meet her? A. I don't recall whether he did or not. He may have, but I don't recall.

Q. Well, you heard that yesterday? A. I'm not sure. I think I may have. I think I heard someone say something to that effect.

Q. Does that indicate this sudden impulse? A. Oh, yes.

Q. It does? A. Oh, yes.

936 Q. Did he tell you, sir, that he had never admitted that act up until the time of this occurrence? A. Until the time of what occurrence?

Q. This occurrence with Sunday Graham. Until the time he was picked up for this he had never admitted that particular rape. A. The rape in Great Neck?

Q. That's right. Did he tell you that? A. Yes, I believe he told me at the time that I spoke with him that he had denied any guilt in that.

Q. Well, you say you believe, sir. Do you have any independent recollection of him having told you that? A. Yes. When I say I believe I mean he did. I do recall his telling me that.

Q. And he told you of an incident involving the touching of the genitals of a small child? A. Yes, he did.

Q. And he told you again that that was an impulse that came over him? A. Yes. Excuse me, I don't think that he actually said it was an impulse. He merely said that he reached out to push her out of the way. I interpreted his behavior as impulsive behavior. He didn't use the term "impulse."

Q. Let me see if I understand you, Doctor. Did he tell you that he reached to play with her genitals or that it was by accident in reaching out? 938
A. Oh, no, it was not accidental.

Q. What did he tell you? A. He said he reached out to push her out of the way and in so doing also touched her genitals.

Q. But that his purpose was to push her away? A. Yes.

Q. And you, I believe, said that that was another impulse? A. Yes.

Q. You also told us that there were a number of these rapes which he told you he planned to do? A. Not planned to rape, no. 939

Q. I think this is an extremely important point and I would like to have the record. A. Well, if it is in the record I obviously misstated myself. I did not intend to convey that he had planned to rape. As I recall, I either said or certainly intended to convey the impression that he intended to have a date in order to have sexual relations. Not for the purpose of rape.

Q. And he told you that there is a certain amount of force expected by the women? A. That's what he felt. Right.

940 Q. Now, did he tell you, sir, that the child prevailed upon him to get ice cream? A. Do you mean Sunday Graham?

Q. Yes. A. Yes.

Q. And he told you, you testified, that in order to get her to stop crying he decided to frighten her and he told her because he knew she was sensitive about this that he was going to play with her pocketbook? A. Yes, that is correct.

Q. Did he tell us that in court yesterday? A. I believe he did.

941 Q. Well, perhaps I can refresh your recollection a little bit, Doctor, that he testified in court that it was for the purpose of getting her to tell the truth to him about this conversation that he threatened to play with her pocketbook.

Mr. Goodman: At this time I respectfully submit that Mr. Cahn has embarked upon a question without relying upon the record. Let us have the record speak for itself. To what page is he referring?

Mr. Cahn: I press that question, sir.

942 The Court: Defense counsel would like to know what page that is of the minutes.

Mr. Cahn: Without the minutes at this time, Judge.

The Court: Let us have the question again.

(Question repeated by the Reporter.)

The Court: Objection overruled. That is a proper question on cross-examination. If you want to pursue it you can on redirect.

Mr. Goodman: May the record indicate that the defense respectfully excepts?

The Court: Do you recall that, yes or no?

The Witness: No, I don't recall.

The Court: Next question.

Mr. Cahn: I ask you to turn to page 341, Mr. Goodman, please. A question by Mr. Goodman: "Then what did you do? A. And she said, 'No, you don't,' and we started fighting and I crawled over the back of the seat and reached and grabbed her and pulled her over and started—told her, 'If you don't tell me the truth I am going to play with your pocketbook.' Knowing that she is sensitive about even mentioning or talking about it. And I felt in that way that— 944

"Q. Speak up. It is hard to hear you. A. I felt in that manner I would be able to determine whether she was actually told the thing she was telling me, or was she just kidding me on it or not. And I laid her down on the back seat and started tickling and playing with her."

Q. Does that refresh your recollection? A. Yes.

Q. Do you know that which is true, Dr. Zolan? A. No, I don't know which is true. I don't know that either of those statements are necessarily 945 exclusive of each other.

Q. Now, did he tell you, sir that he intended to have sexual intercourse with Sunday Graham? A. No, sir, he did not.

Q. Did he deny intending to have sexual intercourse with Sunday Graham? A. Yes, sir.

Q. He told you that all he intended was to play with her pocketbook? A. Yes, that's correct.

Q. Doctor, he could have played with her pocketbook in the front seat of that car, could he not? A. Possibly.

Q. But he went to the back seat of the car, isn't that correct? A. Yes, that's true.

Q. That's what he told you, didn't he? A. Yes.

Q. That's what he told us here in court? A. Yes.

Q. And he pulled Sunday Graham into the back seat of that car, did he not? A. Yes, he did.

Q. Did you believe that he did not have the intent to have intercourse with her, Doctor? A. Well, I believe that at one point or another the intent or the desire to have intercourse occurred.

Q. When he went into the back seat—I'm sorry, did you finish? A. No, that's all right.

947 Q. When he went into the back seat of that car and pulled Sunday Graham into that back seat in your opinion, sir, and from your experience was it not his intent to have intercourse with her? A. I'm not sure. He might have had that intent, but I am certainly in no position to say that that is what he was thinking at that moment. I know a few moments later he did.

Q. And he told you, did he not, sir, that all of a sudden there was a shock of a sexual climax? Is that what he told you? A. He told me that he experienced a shock and that he thought that shock had occurred as a result of the occurrence

948 of the sexual climax.

Q. Did you hear him in court yesterday testify that the shock was as a result of seeing the sperm on the dress of Sunday Graham? A. No, I don't recall that.

Q. "Well, I looked on her dress. About here (indicating) was a sperm, a discharge, and I took my handkerchief and wiped it off the dress." A. I recall his saying that, yes.

Q. Well, Doctor, let me ask you: he said he took his handkerchief and wiped it off. Wouldn't the stain of spermatozoa remain on the dress? A. I believe it would.

Q. Which could be determined by a laboratory examination? A. Yes, I believe so.

Q. Now, he told you, did he not, that they told him something was wrong in prison? A. Yes.

Q. He told you that? A. Well, he indicated that he had been seen by some psychiatrists and psychologists and that they had indicated to him that there was a problem.

Q. Did you know he was let out on parole? A. Do I know? Yes, I do.

Q. Although they told him he had a problem? 950
A. I'm sorry, I can't be responsible for what the Parole Board does.

Q. Now, you talked of irresistible impulse, did you not? A. Yes, that was mentioned.

Q. I think you have been told that that is not considered any part of the law in New York State. A. I know that.

Mr. Cahn: Judge, it was suggested, with which I wholeheartedly concur, that we have a recess for lunch.

The Court: All right, recess until 2:15 951
o'clock.

Gentlemen, do not discuss this case amongst yourselves or with anyone else until you finally deliberate in the jury room at the end of this case.

(A recess was thereupon taken for luncheon.)

952 *Harold Zolan—for Defendant—Cross*

AFTERNOON SESSION

HAROLD ZOLAN, a witness on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination (continued) by Mr. Cahn:

Q. Dr. Zolan, I believe you told us this morning that the defendant informed you that he did not remember what went on in the car after he dragged
953 Sunday Graham into the back seat, up until the time he found the belt in his hand and he found himself between her legs. Is that correct? A. That is not entirely accurate. He did tell me he remembered things that he was able to recall, but they were very few.

Q. Such as, Doctor? A. Well, after he dragged her into the back of the car he placed himself on top of her and then there was this blackout, if you will, and it was then that he experienced the shock that I mentioned before which he interpreted as the sexual climax.

954

Mr. Goodman: Please speak up, Doctor.

Q. Am I correct, then, in stating that he did not remember anything from the time he placed himself on top of her until this sexual climax? A. You are correct in that this is what he told me.

Q. Yes? A. Yes.

Q. Well, from your statements, Doctor, do I assume that you do not believe that? A. No, I didn't say that I don't believe it, but I think that there was a certain amount of detachment in the sense that he was only partly aware of what he

was doing. This kind of mental state quite often occurs in a state of great passion. And although we wouldn't say that the individual involved in this state does not know anything about what he is doing, there is a sort of a state of clouded consciousness.

Q. Dr. Zolan, did he tell you that he remembered taking off her pants? A. I believe so.

Q. Did he tell you that he remembered putting the pants in her mouth? A. No, sir, he did not.

Q. Did he tell you that he remembered her fighting him while he was attempting to have intercourse? A. He did mention that he recalled that she struggled in the process of his attempt to remove her pants. Nothing to the effect of struggling in the process— 956

Q. In the course of the intercourse? A. Yes.

Q. Well, I read from People's Exhibit 28 in evidence, which is the statement he gave me on the morning of May 14th, I believe it was. Yes.

"Q."—page 29—"All right, now, where did you have intercourse with her? A. That must have been there.

"Q. Was she still alive when you had intercourse with her? A. I guess she was. 957

"Q. Well, did she scream? A. She must have because there was groaning and breathing, et cetera.

"Q. I don't hear you. A. There was breathing and gasping going on, so I expect she must have been.

"Q. Did she tell you to stop? A. No, she probably gagged at that time."

Doctor, would this indicate to you that he knew what was going on at that time? A. Well, of course I think it is a matter of interpretation of

what he was saying, because there is an awful lot of must have beens and probablys, and therefore I am unable to evaluate what he said in terms of whether this is exactly what he believed that occurred or whether he was still in retrospect attempting to fill in a memory defect.

Q. He doesn't say probably or must have been here: "A. There was breathing and grasping going on." A. Then obviously he knew that this was going on, sure.

959 Q. These questions and these answers, page 30:

"Q. All right, now, after you finished—you finished inside of her, did you? A. Yes.

"Q. Did she tell you at any time that you hurt her? A. I guess she did. Yes.

"Q. And is that when you put the pants in her mouth? A. Yes.

"Q. She started to scream, did she not? A. Yes.

"Q. And you put her pants in her mouth? A. Yes."

Does that indicate that he knew that he was putting the pants in her mouth, Doctor? A. Well,

960 if this is what he said and if this is what he recalled having done, it would certainly indicate that he knew what he was doing.

Q. And then this question and this answer, sir, page 31:

"All right, now, after you finished inside of her what did you do? A. Took her belt and put it around her to stop her from fighting and going on."

Did that indicate that he knew he took the belt and put it around her neck? A. Well, I can't—my reply to that is the same as before. If this is

what he said and if this is what he recalled then it would certainly indicate that he knew what he was doing.

Q. Now, Doctor, you spoke of irresistible impulse, A. Yes.

Q. Was it as a result of irresistible impulse, sir, that he threatened little Sunday Graham to play with her pocketbook? A. No, I don't believe so.

Q. But am I correct in assuming that you stated it was as a result of irresistible impulse that he had intercourse with Sunday Graham? A. Yes, that's correct. 962

Q. Well, now, I believe you also told us, Dr. Zolan, that the defendant, Willard Phillips, told you that it was only after he was playing with her private parts that he got the desire to have intercourse with her. A. Yes.

Q. Well, Doctor, isn't this a natural sexual reaction in any human being? A. I imagine it might be, but it wouldn't be irresistible in the average normal human being.

Q. Well, why do you say that it was irresistible in this particular instance? A. Because the normal person will resist this. He obviously didn't and wasn't able to. This is the act of an abnormal mind. 963

Q. Dr. Zolan, isn't it a fact that the average person would want to resist this desire? A. Well, I believe so.

Q. And isn't it a fact that in so far as Willard Phillips is concerned not that he couldn't but that he didn't want to resist the desire? A. Well, I don't see that as a fact, sir. I'm sorry.

Q. Doctor, did he have intercourse or did he tell you that he had intercourse with the little girl in Levittown that he molested? A. No.

964 *Harold Zolan—for Defendant—Cross*

Q. Would you say he resisted the impulse then? A. I don't know that there was such an impulse.

Q. And then I assume that you know that there was an impulse here simply because he performed the act? A. I think it is a reasonable deduction.

Q. And is it also reasonable to assume that it was irresistible? A. Well, I think it is reasonable to assume that any individual who is not able to control himself is functioning under the effect of an irresistible impulse.

965 Q. Isn't it a fact, sir, that the individual who is not able to control himself and the individual who doesn't want to control himself are totally different? A. The individual who is unable and unwilling? Yes, these are two separate entities, of course.

Q. And do you state, Doctor, unequivocally, that Willard Phillips was unable to control himself? A. Yes.

Q. And it couldn't possibly be that he didn't want to control himself? A. Well, he may not have wanted to in addition.

966 Q. As a matter of fact, Willard Phillips in playing with Sunday Graham's private parts was sexually stimulated, was he not? A. I think he may have been, sure.

Q. Isn't that a reasonable assumption, too, Dr. Zolan? A. Yes, it is.

Q. As any man would be. A. I don't think any man would play with the genitals of an 8-year-old girl.

Q. That is correct, isn't it? A. That's right.

Q. And he didn't have the irresistible impulse to play with Sunday Graham at that time? A. I didn't say that he had an irresistible impulse to play with her.

Q. He didn't have the irresistible impulse in forcing him to play with Sunday Graham at that time? A. I didn't say that he had an irresistible impulse to play with her genitals.

Q. We agree. This was his own desire, his own mind, is that correct? A. Well, this is what we are talking about, his mind.

Q. Yes. And then was it the same impulse on his part that— A. Well, it must have been his impulse. It certainly wasn't anyone else's. He was behaving from his own feelings, his own drive.

Q. Well, but the playing with the genitals of 968
Sunday was not as a result of the irresistible impulse? A. No.

Q. He decided he was going to play with the genitals of Sunday Graham, did he not? A. I assume he did.

Q. As a matter of fact, Dr. Zolan, isn't it true—by an irresistible impulse in reference to the defendant in this case don't you mean in plain English that this man had a strong sexual desire, a strong sexual drive which he gratified regardless of the consequences, regardless of who got hurt so long as it was not himself? A. Well, he cer- 969
tainly had a strong sexual urge. It was not a normal sexual urge. It was certainly an overpowering, overwhelming urge. The effect of the gratification of this urge I doubt very much had anything to do with his deciding to do what he was doing.

Q. Pardon? A. I doubt very much that he considered—in fact, I don't believe that he considered what harm would accrue to himself or anyone else. It was not a matter of the logical thought process. It was the impulsive behavior responding to deep-seated aggressive drive.

Q. He was not concerned with what would happen to himself? A. I don't think he was concerned at the time with what would happen to anybody.

Q. Is that why he hid the body, Doctor, and denied his guilt for sixteen hours? A. I am speaking now of the time of the act itself.

Q. Doctor, isn't it possible in the light of some of these questions and answers that I read to you—I will withdraw that and ask you this: Is it not possible for a sociopathic personality to premeditate and deliberate? A. Why, certainly.

971 Q. It is, is it not? A. Why, certainly.

Q. He could premeditate and deliberate murder, couldn't he? A. All I can say is that he has average intellectual endowment; with these intellectual endowments he may premeditate. Whether he would premeditate murder or anything else I am in no position to say.

Q. Is it not possible, Dr. Zolan, that this defendant, Willard Phillips, decided to kill Sunday Graham to prevent her from identifying him as the one who committed sexual intercourse with her?

972 Mr. Goodman: If your Honor please, I must object upon the ground that it has already been demonstrated through the testimony of the People's witness, the Medical Examiner, that the act of putting the belt around her neck had nothing to do with the child's death; that it was put there loosely.

The Court: I am sustaining the objection to the question on other grounds.

Mr. Cahn: May I know the grounds?

The Court: On the ground that he cannot read the mind of what the defendant intended. If you want to say in his opinion—

Mr. Cahn: That's what I meant.

By Mr. Cahn:

Q. I will ask you, in your opinion, Doctor, from your experience, from your questioning of this defendant, from the questions and answers which I read to you, accepting those as true, in your opinion is it not possible, sir, that the defendant, Willard Phillips, killed Sunday Graham to prevent her from identifying him as the person who had intercourse with her?

Mr. Goodman: I repeat my objection upon 974
the same grounds; namely, that it is predicated upon facts contrary to this evidence.

The Court: Objection overruled.

Mr. Goodman: I respectfully except.

A. It is my opinion that the act which resulted in her death was another act of impulse and not a matter of attempting to eliminate her as a source of future identification.

Q. I asked you, sir, if it were possible for that to be true. A. I am sure anything is possible, but you are asking for my opinion and I am giving 975
you an opinion.

Q. I am asking you if in your opinion it is possible.

Mr. Goodman: I object upon the ground that that is dealing with speculation.

The Court: You are speaking to an expert. Overruled. I will permit it.

Q. Is it possible, sir, in your opinion, to have been the case? A. Yes, I think it is possible, certainly.

976 Q. I ask you to take into consideration, sir that the defendant stated on this witness stand that he had been convicted of rape on the basis of the identification of the person assaulted. Taking that into consideration I ask you, sir, in your opinion is it not the probable reason? A. In my opinion it is not the probable reason.

Mr. Cahn: Thank you, Dr. Zolan.

Redirect examination by Mr. Goodman:

977 Q. Doctor, Mr. Cahn has asked you whether or not sociopathic personality is descriptive of a behavior disorder as opposed to a mental disorder. Do you recall his propounding that question? A. Yes, sir, I do.

Q. Doctor, is it not true that all behavior stems from a mental process? A. Yes, it most certainly is true.

Q. So that any behavior disorder, Doctor, is symptomatic of a possible mental disorder; is that not true? A. Yes, sir.

978 Q. Speaking now, Doctor, with respect to the period when the defendant said that he was upstairs in that floor waxing place while the body of the child was in the back seat of his car parked in a public place, is it not true that at that time the defendant was experiencing a conflict of emotions and intellect in the sense that he had an instinct or emotion or a desire to be apprehended which was opposed to a natural desire not to be apprehended and destroyed? A. Well, I think the best way that I can answer that question, Mr. Goodman, is to say that consciously and intellectually this man behaved as anyone else would

who had committed a crime and was now seeking to escape some sort of retribution for it. The point is that all of his behavior is not motivated by conscious thought alone. Much of his behavior is motivated by unconscious thought, subconscious thought, and there is, of course, every reason to believe that this rather careless leaving of a dead body in the back of one's car has a very specific and very definite subconscious motivation; and, in my opinion, the motivation for this behavior was an effort to cause himself to be apprehended. 970

Q. And is it true that at the same time that he was experiencing that subconscious motivation he was also finding himself in conflict with the natural design not to be apprehended and suffer the consequences? A. I think that is true enough, and I think that was borne out by later behavior.

Q. Mr. Cahn has asked you whether or not in your opinion the jails are full of sociopathic personalities. Do you recall that? A. Yes, sir, I do.

Q. Doctor, is it your opinion and is it that of the medical profession, and particularly the psychiatric profession specifically, that hospitals should be full of these personalities rather than jails? A. It most certainly is. 981

Q. Doctor, in your opinion, was the ultimate assault committed by this defendant upon that little child motivated by an emotional impulse? A. Yes, it was.

Q. Regardless of whether or not that impulse took place while he was in the front seat of the car or after he got into the back with the child; is that correct? A. It was motivated by an impulse; that's correct.

Q. Is it also not true that one suffering from the cloudy consciousness, this disassociation which you have described as that under which the defendant was suffering at the time, does not prevent an individual from being aware of certain things? A. This is not a complete state of detachment or amnesia in which the individual would say that he was not aware of anything. It is just a clouding of consciousness, a lack of complete perception of what is going on around him.

983 Q. Isn't that almost or isn't it quite similar to the experience that one has when one was quite intoxicated in the sense that they act and think in a cloudy atmosphere, yet there is a certain awareness of what they are doing? A. Well, of course, now you are introducing the additional element of intoxication which produces intoxication, but these people are in some sense clouded. They are aware of what they are doing, but not completely aware. Their ability to perceive things is impaired. Their ability to remember things is impaired, and their general attention is impaired.

984 Q. And, Doctor, you have testified that it is possible that the act of the defendant in playing with the private parts of the child was not impulsive. Is it not true that nevertheless such an act, even though not impulsive, was symptomatic of a sociopathic personality disturbance? A. It most certainly is.

Q. Is it not true also, Doctor, that all of the things which you have described together in composite were the basis for your diagnosis as given in this court? A. That's correct.

Q. Speaking now about the possibility of fear of identification by the defendant, Doctor, did he not tell you that he had committed so many rapes he couldn't number them? A. Yes, he did.

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Q. And yet he also told you that with all of this vast experience in this very questionable field of conduct he had only been apprehended once? A. Once for rape, that's correct.

Q. Did he tell you that he concealed his identity from these innumerable victims of his? A. No, quite the contrary as a matter of fact. He related that after such an experience he would be anxious for the victim not to be angry with him and he would walk with them and talk with them and attempt to persuade them that this hadn't been such a terrible thing, and perhaps even offer them money. Now, under such circumstances, this does not appear to be an effort to disguise one's identity by prolonging the contact with the victim.

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Q. Did he not tell you Doctor, as he swore upon the witness stand, that in his opinion and by his standards it is not wrong to have sexual relations with an eight-year-old child as long as it is not against the wishes of the child? A. That's correct.

Mr. Goodman: I have no further questions.

Recross examination by Mr. Cahn:

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Q. Doctor, getting back to this business of filling out this application, you again assume that the child was in the car downstairs; do you not? A. Yes.

Q. And in People's Exhibit 28 in evidence he states that he had already dumped the body. Wouldn't that put an entirely different picture to this whole thing? A. No, not really. The only thing that might possibly be changed would be the implication of unconscious guilt and desire for punishment, but this is not inherent nor is it

988 most significant—the most significant aspect of the condition that we are talking about. The significant aspect of this situation that here is an individual who has committed a brutal crime and is now able to go up into an office and for practically an hour normally answer questions and gives pertinent personal information about himself. There I feel is the pertinent and significant part of the situation.

Q. Now, talking of irresistible impulse, he told
989 you that he had the desire to have intercourse with her after he was playing with her genital parts; is that not correct? A. Yes.

Q. Again I read from People's Exhibit 28 in evidence—

Mr. Goodman: If your Honor please, I submit that this is all repetitious. We have been over it. The jury has gotten the point, I am sure.

Mr. Cahn: He talked about it.

The Court: Counsel, we have gone through this on cross examination.

990 Mr. Cahn: And it was brought out on redirect and I am bringing it out on recross.

The Court: All right, you can bring this point out, and then I am going to start restricting you.

By Mr. Cahn:

Q. "Q. When did you get the idea that you were going to have intercourse with her? A. After I went around Greenwich Street."

Doctor, does that indicate any irresistible impulse?

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A. I am testifying about irresistible impulse on the basis of my examination of the patient; not on the basis of his confession.

Q. I understand that, sir, but now I am giving you a little further information. He told you that he drove to Bethpage Park or around Bethpage, did he not? A. Yes.

Q. That is where he told you after playing with the genitals he decided he would have intercourse with her? A. That's correct.

Q. And you stated that was the basis of your conclusion that this was the irresistible impulse? A. Correct.

992

Q. And I am reading from People's Exhibit 28 wherein he told me that he decided to have intercourse with her at Greenwich Street which is just one block away from where he picked her up. And, do you still have the idea that this was an irresistible impulse? A. Again, Mr. Cahn, all I can do is tell you that I am basing my opinion on the examination of this patient and my examination was as you have understood it to be.

Q. But what are you accepting, sir, is what he told you was true. A. That's correct.

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Q. Now, accepting what he stated in People's Exhibit 28 as true, sir, would you say it was an irresistible impulse? A. I would say certainly that it had the qualities of impulse about it, namely, the fact that when he saw this child or whether he had this when he saw her or when she got into the car, it was still an impulse and I think it is important to remember that this sort of individual when overcome or when involved with his impulses, a pathological impulse, does experience an overwhelming type of reaction in a situation. And, under these conditions the fact that he

thought of this as soon as she got in the car or shortly after she got in the car would still not imply or still not indicate that this was not an impulsive kind of thing.

Q. Doctor, if I decide to pick up this book and pick it up, isn't that picking up a result of an impulse that went through me to pick it up? A. Yes.

Q. Now, you said that after he told you after he got through raping these so many women that he couldn't count them he would talk to them and
995 persuade them and offer them money, and you felt that that was an indication of what, sir? A. I don't recall saying that I thought it was an indication of anything. I do recall saying that he was attempting to cause them not to be angry and not to be upset about their experience.

Q. And cause them not to turn him into the police? A. I don't know whether that was in his mind or not. I am telling you what he reported to me.

Q. What he told you? A. That's correct.

996 M. Cahn: Thank you very much.

The Court: Step down.

Mr. Goodman: Thank you, Doctor.

The Court: Next witness.

Mr. Goodman: Defense rests, if your Honor please.

Mr. Cahn: I would like to state at this time that from your actions, from your Honor's actions, you indicate that you are angry at me for my cross examination. I don't think you intended to convey that impression to the jury or to me.

The Court: If it was conveyed to anybody it was only you, Mr. Cahn, because I don't know where you are getting that from.

Mr. Cahn: I must state what I feel, your Honor.

The Court: Then change your feelings.

Mr. Cahn: If you say so, I will.

The Court: All right. Any further witnesses?

Mr. Cahn: Yes, Dr. D'Angelo.

998

DR. ERNANI D'ANGELO, called as a witness in behalf of the People, first being duly sworn, testified as follows:

By the Clerk:

Q. What is your name? A. Dr. Ernani D'Angelo.

Q. Where do you live, Doctor? A. 88-29 150th Street, Jamaica.

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Direct examination by Mr. Cahn:

Q. Dr. D'Angelo, you are a practicing physician in the State of New York. A. I am.

Q. When were you admitted to practice. A. 1930.

Q. Would you give us something of your scholastic, medical and specialized background, please. A. I graduated from Cornell Medical School in 1929. I was licensed to practiced in New York State in 1930. I interned for two years at St. Johns Hospital in Long Island City. After that

1000 I did general practice until 1937, and for the next eight years from the beginning of 1937 to the end of 1944 I was resident physician at Kings Park State Hospital, and since then I have been in private practice limited to psychiatry in Jamaica.

My qualifications: I am a qualified psychiatrist with the New York State Department of Mental Hygiene. I am on the veterans panel of specialists with the V. A. I have a specialist's rating with the Workmen's Compensation Board, and I am a
1001 diplomate of the American Board of Phychiatry, and I am on the state staff of the neuropsychiatric staff of Queens General Hospital.

Q. Doctor, did you, at the request of the District Attorney's office of Nassau County, along with one Dr. Meister, examine the defendant Willard Phillips? A. I did.

Q. When was your examination? A. It was on May 14, the afternoon of May 14.

Q. Where was it? A. I believe it was in police headquarters in Mineola.

Q. Now, Doctor, we have had some discussions, sir, as to sociopathic personality. I am not sure
1002 I quite understand. Will you tell me, sir, and tell this Court and jury, what sociopathic personality is. A. A sociopathic or psychopathic, as I call it, the old term, to me simply means an individual who violates either the written or the unwritten law. That is the first part of it; and secondly, he continues to repeat those violations regardless of past experiences or punishments. In other words, you must have the two to have a psychopathic personality.

If an individual just commits, let us say, he violates the written or unwritten law now and then he has committed what we call a psychopathic act,

ut he doesn't become a psychopathic personality. Ie is a psychopathic personality if he continues to epeat those violations regardless of past experi- nces or punishments. Now, that is as simple as can make the definition.

Q. Is that a mental condition? A. No, in my es- mation it is definitely not a mental condition. It what we call a behavior disorder. Now, a phy- hopathic personality can develop a mental con- ition just like any other individual can develop a ental condition which the psychopathic or neu- otic or let us say a normal individual develops 1004 lusions, that is bizarre imaginations, or if he ears imaginary voices he becomes a phychopathic ersonality with a mental condition or with a psy- hosis. But, if he doesn't have a psychosis he is plain psychopathic personality without any men- al condition. I am using that mental condition nd psychosis as synonymous.

Q. Can one with a psychopathic and sociopathic ersonality premeditate and deliberate? A. Very efinitely. They always do unless they have a ental condition or psychosis.

Q. In your examination of the defendant Wil- 1005 rd Phillips, did you find a sociopathic or psycho- athic personality. A. Yes, I would say he is a sychopathic personality.

Q. Did you find any psychosis? A. No evidence any kind of mental condition or even a nervous ndition.

Q. Was the defendant, in your opinion, always contact with reality while examining him? A. all times.

Q. Was he suffering from any delusions, bizarre aginations or hallucination? A. None whatso- er.

1006 Q. Dr. D'Angelo, did you question the defendant as to the alleged crime? A. I did.

Q. Will you tell us if you will, please, what you asked him and what he told you. A. I just asked him for a story of what had happened and he told me on this particular afternoon he went by the school to pick up Sunday Graham for no particular reason as far as he told me. He said that after he picked her up he took her for some ice cream; that after that he drove around and parked the car. I don't remember the exact location—

1007 and that there he raped her and at the same time he strangled and suffocated her, and that following that he disposed of the body. I think he did mention the fact that he went to fill out some sort of application for a job; that after that he ate, and that after that he went home and slept.

Now, what I was interested in was not so much the details of it, was the fact that whether he told a coherent, a chonological story of the events that happened so that I could determine whether he was in good contact, whether he knew what he was doing, whether he knew the wrong from

1008 the right, and whether he had any mental condition.

Q. Now, we have been also talking of irresistible impulse in this case. Doctor, in so far as the defendant is concerned, is not irresistible impulse in reference to this defendant a man who has a strong sex drive which he gratifies regardless of who he hurts so long as it is not himself? A. What is the question?

Q. Is that not what irresistible impulse is in so far as this particular case is concerned? A. I

could find no evidence of any irresistible impulse here. All I saw was that he had a sex feeling and he gratified, and during the time he choked and strangled the girl.

Q. In your opinion, Doctor, from what you have observed in this courtroom—by the way, you did hear the defendant testify? A. That was my opinion from my examination.

Q. You did hear the defendant testify here in court? A. I did yesterday. I was here.

Q. From what you heard in the courtroom and from your examination, sir, would you state that this act was as a result of an irresistible impulse? A. I would say no. 1010

Q. Would you state, sir, from what you observed in this courtroom and from your examination of this defendant that he had a strong sex desire or strong sex drive? A. Yes, I would.

Q. And from your experience, Doctor, would you say that the strong sex drive has any relation to murder?

Mr. Goodman: If your Honor please, I submit that is a most vague question. I don't know what the District Attorney is trying to ask. 1011

The Court: Is it vague to the witness?

By the Court:

Q. Do you understand the question? A. To this particular—

By Mr. Cahn:

Q. Yes, in this particular instance.

Mr. Goodman: May I have the question either reread to me or rephrased because I don't understand it.

The Court: Please reread the question.

Mr. Cahn: I will withdraw it and put it this way, if I may:

Q. Could this defendant, in your opinion and from your examination and from what you have heard in this court, Dr. D'Angelo, with this strong sex drive deliberate and premeditate a murder?

1013 A. Well, he could. Certainly he could.

Q. Could he also premeditate and deliberate on whether or not to have intercourse with a woman? A. Certainly.

Q. We have heard the term sex fiend or sex maniac used in so far as lay language was concerned, Doctor. In your opinion and from your examination of the defendant Willard H. Phillips, is he a sex maniac or a sex fiend? A. I would say no, because to me that would imply a psychosis associated with these acts and I could find no evidence, no symptoms indicative of any mental con-

1014 dition here. I could find none whatsoever at any time.

Mr. Cahn: That you. That's all.

Cross examination by Mr. Goodman:

Q. Doctor, at what time of the day were you called to conduct this examination of the defendant? A. I believe it was about 1 P. M.

Q. On May 14? A. That's right. I believe that was the date.

Q. Where did the examination take place? A. I think it was in police headquarters here.

Q. Had you been told by the police in advance that they had in custody for your examination a man charged with the rape and murder of an 8-year-old girl? A. That's right, yes.

Q. Did they also tell you that they anticipated a possible defense of insanity and they wanted you to make an examination so as to be able to overcome such a defense? A. No. I was called to examine him for his mental condition and to render an opinion purely as a physician which is the only manner I am ever called, which is the only way I would respond to such a request, not for 1016 any preconceived conclusion at any time.

Q. Doctor, was there any other physician present while you were conducting this examination? A. Dr. Meister.

Q. Were the two of you alone together with the defendant while the examination was being conducted? A. That's right. I believe we were. Sometimes there is an attendant present, but I don't remember if there was.

Q. Did you make notes as you examined the defendant? A. That's right, I did.

Q. Do you have those notes with you, Doctor? 1017 A. No, I don't have them with me.

Q. You knew that you were going to testify here in court today, did you not? A. They were just some quotes; as he talked I wrote them down. That's right, I knew I was going to testify.

Q. In any event, Doctor, you didn't see fit to bring those notes to court with you today, is that right? A. I don't even have them any more.

Q. Do I understand, then, that whatever notes you had made on the occasion of this examination you saw fit to destroy? A. I don't have them. That's right, yes.

1018 Q. You didn't consider that they would be important on your interrogation; is that correct? A. They were important for myself to form a conclusion, yes.

Q. But you didn't feel that they would be important as an aid to this Court in determining the accuracy of your conclusion, did you, Doctor? A. I just wrote down what he said. No, I didn't.

Q. How long in all, Doctor, was this examination continued? A. About an hour.

1019 Q. One hour? A. That's right.

Q. Can you tell us or give us an outline of what it was that you asked this man while conducting this examination to determine his sanity? A. Well, I just wanted to get a story from him, and as he gave the story I formed my opinion as to his sanity or insanity. In other words, what I am interested in is this: First of all, his general emotional picture. Secondly, whether he is in contact as to time, place or person. Then whether he expresses any delusions. Then whether he has any hallucinations, and whether he has any insight into his story or to his act.

1020 Now, that is briefly the material that one uses in order to form an opinion as to whether an individual is sane or insane. That, as a rule, is not difficult at all, and as an individual talks you decide those major points. And, if they are O.K. he is normal. If there is anything abnormal about those points then you decide what the abnormality is.

Q. Doctor, I now ask you to please answer my question and please tell us what it was you asked that man that afternoon. A. I already told you I asked him first of all his background.

Q. Did he give you his entire life's history, Doctor? A. Not his entire life history; of course not.

Q. Did he tell you where he was born? A. That's right.

Q. Did he tell you that he didn't live with his mother? A. Yes.

Q. Did he tell you that he was an illegitimate child? A. No, he didn't tell me that.

Q. Did he tell you that his mother had abandoned him with his grandmother? A. He said that he lived with his grandparents, yes. 1022

Q. Did he tell you he suffered and experienced frustration and inhibitions as a boy? A. No, not at all.

Q. Did you ask him how old he was when he had his first sex experience? A. No, I didn't.

Q. Did you ask him how frequently it was that he had sex experience as a boy? A. It wasn't necessary for me to ask him that to determine his sanity.

Q. Doctor, I merely ask you to answer me yes or no. A. No, I didn't.

Q. Did you ever ask him if he participated in homosexual conduct; just yes or no. A. No, I didn't. 1023

Q. Did you ask him if he ever committed an act of rape upon anyone else other than Sunday Graham? A. I am trying to think now—yes, I did.

Q. What was his response, Doctor? A. He told me he did.

Q. Did he tell you how frequently he had committed acts of rape? A. No, just that once; that's all, just once he mentioned.

Q. So that, Doctor, the opinion to which you came after one hour of examination was predi-

1024 cated upon your understanding that this man had committed one act of rape in his life? A. Oh, no, no, I told you what I based my opinion on.

Q. I say within the many things upon which you predicated your ultimate conclusion was the assumption that he had only committed the act of rape once in his life, is that correct? A. I didn't consider that all, that one factor in my determination of his sanity. That wasn't important.

1025 Q. Doctor, if you had known that the man had raped fifty different women before he raped Sunday Graham would your opinion as to his sanity be different. A. Not at all.

Q. Still the same? A. Not in the least.

Q. So that if he had raped fifty women, as far as you were concerned he was merely a psychopathic personality which is merely sympotomatic of behavior? A. Absolutely.

Q. So that a man who commits fifty promiscuous acts of rape in your opinion is not suffering from a mental disorder; is that your definition? A. Definitely not.

1026 Q. And is it your opinion, Doctor, based upon your training and your experience that a man who commits an act of rape and murder upon an 8-year-old child is merely suffering from behavior misconduct or disorder? A. That's right. He is suffering from sex feeling which he does not control and he is perfectly sane one hundred per cent in my estimation. He shows no evidence at any time of any mental disorder, mental condition or psychosis.

Q. We are now speaking generally, not of the defendant, Doctor. We understand each other, don't we? A. O.K.

Q. Is there such a thing or such an individual which we of the lay people characterize as a sex maniac. A. Well, I suppose that would mean an individual who commits abnormal sexual acts and who also is psychotic. That would be my definition of it. You may get another definition from another psychiatrist because I don't think that is in the psychiatric terminology. I have never come across it in the regular nomenclature.

Q. Doctor, let us speak in terms of every-day experience of people not trained in psychiatry and I ask you: Has there ever been in the history of the world a man who had on frequent occasion an overpowering sex impulse, so overpowering that he would ravish the first female that was in his sight while he was suffering from that impulse. A. That I suppose would come under the term of a mental condition. It depends. 1028

Q. Doctor, I am simply asking you: Has there ever been within the experience of you psychiatrists one such individual? A. I have never come across him, if that is what you mean.

Q. Have you studied about such, Doctor? A. That seems to be more of a lay person's term than an actual fact. 1029

Q. Are you familiar with the provisions of the law of the State with respect to the punishment of sex offenders? A. No, not fully, no.

Q. Are you aware that a recently enacted law required that a defendant convicted of a sex offense be sentenced by the judge for an indeterminate sentence until such time as it is determined by psychiatry study—psychiatric study and observation and examination—that he no longer represents a sex menace to society?

1030 Mr. Cahn: I know Mr. Goodman doesn't mean to misquote, but that is not so at all.

The Court: Sustained.

Q. Doctor, is it your testimony that a man can be guilty in the life span of 42 years of fifty acts of rape and that he is not suffering from a mental disorder? A. Absolutely.

Q. That is your testimony? A. Absolutely.

Q. Doctor, are you familiar with the Committee on Nomenclature and Statistics of the American
1031 Psychiatric Association? A. I have a copy of the book.

Q. I asked you, sir, if you are familiar with that committee. A. Yes, I am.

Q. You are familiar with the American Psychiatric Association Mental Hospital Service in Washington? A. I am.

Q. Are you aware that in 1952 they published a Diagnostic and Statistical Manual? A. I am.

Q. I would ask you to look at this and tell me, sir, whether it is a true copy of such a manual. A. It is. I can see it from here.

1032 Q. Would you look at page 38, please. Do you see it, Doctor? A. I do.

Q. Do you notice the caption at the top of the page? A. I do.

Q. What is that particular chapter in that pamphlet devoted to, Doctor? A. Shall I read it.

Q. Just the top. A. Mental disorders.

Q. Mental disorders; is that right? A. That's right.

Q. May I see it, please? Did you read this pamphlet, Doctor? A. I refer to it at times. I haven't read it through.

Q. Do you recognize it as an accredited publication? A. I do.

Q. Is it accepted by the psychiatric profession as authentic. A. It is.

Q. Is it not true that the pamphlet which I hold before me in the chapter on mental disorders carries the following: "Sociopathic Personality Disturbance. Individuals to be placed in this category are ill primarily in terms of society and of conformity with the prevailing cultural milieu, and not only in terms of personal discomfort and relations with other individuals. However, sociopathic reactions are very often symptomatic of severe underlying personality disorder, neurosis or psychosis, or occur as the result of organic brain injury or disease. Before a definitive diagnosis in this group is employed, strict attention must be paid to the possibility of the presence of a more primary personality disturbance; such underlying disturbance will be diagnosed when recognized. Reactions will be differentiated as defined below."

1034

Now, is that an authentic and accurate dissertation on sociopathic personality? A. That doesn't contradict one word I said.

1035

Q. I just asked you, sir, is that correct? A. Definitely. It is very authentic, very authentic.

Q. Let me continue, Doctor, on the same page at the bottom, speaking now of the various reactions just mentioned—"Sexual Deviation. This diagnosis is reserved for deviant sexuality which is not symptomatic of more extensive syndromes, such as schizophrenic and obsessional reactions. The term includes most of the cases formerly classed as 'psychopathic personality with patho-

logic sexuality.' The diagnosis will specify the type of the pathologic behavior, such as homosexuality, transvestism, pedophilia, fetishism and sexual sadism including rape, sexual assault and mutilation.''

Is that correct, Doctor? A. That is.

Q. Did you attempt in your test of Phillips to determine whether or not any of the symptoms mentioned in this pamphlet applied to him? A. He shows none. He shows none. That's what
1037 I told you before, and I am repeating again, he shows no signs of any psychosis. A man could have these sexual deviations and be a hundred per cent sane. A man can have these sexual deviations and be a hundred per cent insane, but he must show these psychotic symptoms in order to be insane. Just having that sexual deviation doesn't mean he is insane, but if he has psychotic symptoms or psychiatric symptoms, that is different, which he doesn't show.

Q. Are there not quite a few types of mental disorder, insanity, if you please, in which there are periods when the victim or the patient is ob-
1038 viously and apparently completely sane and coherent, and yet other periods when under stress of emotion or other stimuli he is completely psychotic? A. Yes, they have periods where they are recovered, certainly.

Q. Now, when you examined this defendant he was under arrest and charged with crime, isn't that correct? A. That's right.

Q. And you knew it, didn't you, Doctor? A. Of course I knew it.

Q. Now, isn't it also true, Doctor, that you as a reasonable, experienced, qualified medical man specializing in the field of psychiatry, would never

certify an individual as sane or insane based upon the examination which you conducted in this case? A. I do it every day.

Q. Doctor, aren't there quite a few types of tests which a careful, prudent psychiatrist will conduct before coming to a definite conclusion or opinion with respect to the sanity of a patient? A. If you need the additional evidence. Only if you need it. I didn't in this case to determine his sanity. He had every emotion and every statement and every—all his actions were within normal limits which made him sane as far as I was concerned. 1040

Q. Doctor, did you hear Dr. Zolan on the witness stand? A. I did.

Q. And did you hear him outline in great detail all of this extensive history which he procured from the defendant? A. I got most of that myself, too.

Q. Most of it, Doctor? A. Yes, I got most of that myself, too. I started from his birth until I saw him. He covered it all with me.

Q. The entire story? A. I said most of it. I didn't go into the sexual history in that detail at all. I never do unless there is a reason for it. 1041

Q. Well, isn't there a reason in determining whether or not you have got a psychopathic personality of a sexual deviate on your hands? A. Yes, there is.

Q. You knew you were dealing with a man charged with a horrible sex crime, did you not, Doctor? A. That's right.

Q. And yet you didn't see fit in order to come to a conclusion which might result in his going to the electric chair to determine the history of

his prior sex conduct, did you? A. The sex history I got from him was average. There was nothing too unusual.

Q. Did he tell you, Doctor, that he had raped more women than he could estimate? A. No, he didn't tell me that, but he told me about his sexual life in general and with Mrs. Graham in particular.

Q. Did he tell you that while he was engaging in as many as four or five times a day of marital intercourse with his wife he was still seeing other
1043 women on the side, sir? A. No, he didn't tell me that: It wouldn't make any difference if he did.

Q. That would not change your opinion? A. Not in the least as far as his sanity is concerned, no. He has got a strong sex urge. That is all it would tell me, but it wouldn't tell me that he was insane or abnormal in other ways or in a total way.

Q. Doctor, did he not tell you that he was driving by Greenwich Street when he happened to bump into Sunday Graham that day? A. He did.

Q. That was just about what he told you, is that
1044 right? A. That was the beginning of that particular incident, yes.

Q. And what, if anything, did he tell you with respect to the fact that ultimately there was an attack upon the child? A. Well, he told me, as I said—she asked for some ice cream and he drove her to some place where they bought some ice cream and then she said she wanted to go home and he said he was going to take her for a drive, for a ride.

He stopped at one place and he started in to rape her. He put her in the back seat, he began

raping her, she screamed, he put her panties in her mouth so that she wouldn't be heard.

Q. So that what? A. So that she wouldn't be heard screaming. And he put her belt around her neck at the same time and he raped her and after that he drove down, deposited the body, and then went, as I mentioned before, for this application, then went home and slept. Now, that was the story he gave me.

Q. And that represents the whole story as you recall it? A. That is the outline, the summary of it. 1046

What I was interested in was this: he was able to give a story. He knew what he did, he knew where it happened. He was in contact as to time, place and person. He had no type of delusion or hallucination. He had judgment and insight. That is sanity.

Q. Doctor, is irresistible impulse a recognized and accepted doctrine of psychiatry? A. It is accepted in a case—

Q. Is it also not true that those who have suffered from irresistible impulse are nonetheless able to coherently and intelligently describe what occurred before or after or even during the act in the carrying out of that impulse? A. Certainly they are, when— 1047

Q. Then is it not true, Doctor, that notwithstanding the fact that the defendant gave you a clear, reasonable, coherent story, that in and of itself does not preclude the fact that he might have suffered from a mental disorder? A. In his case it did preclude it.

Q. I ask you generally, Doctor, whether or not that fact in and of itself, disregarding anything else—A. No, that fact does not preclude it, no.

1048 Q. Doctor, would you regard the act of an adult male committing rape and causing the death of a child as an act of good judgment? A. No.

Q. Wouldn't you regard that as a very obvious symptom of sociopathic personality? A. As I said, it was a psychopathic act. I said that already. There is no doubt about that. Any violation of a written or unwritten law is a psychopathic act.

Q. And is it not true from a psychiatric point of view that one who commits a sociopathic per-
1049 sonality disturbance act of that type and repeats it, as in the case of this defendant, fifty different times without regard to apprehension or punishment, right or wrong, that such a history is clear evidence of an individual suffering from a sociopathic personality? A. In this case he was rational, though. So we have to qualify that. Because he took steps not to be caught.

Q. And that is to you the premises upon which you predicate this opinion, is that it? A. I didn't even give an opinion. I said he is sane and that he is a psychopathic personality. A psychopathic
1050 personality is sane, always sane.

Q. Doctor, in your opinion, obliterating from your mind, if you will, the one act of the murder of Sunday Graham, do you believe that Willard H. Phillips should be permitted to go free in society?

Mr. Cahn: Objection.
The Court: Sustained.

Q. In your opinion in this man's present condition does he constitute a menace to society?

Mr. Cahn: Objection.

The Court: I will permit it. Overruled.

A. Very definitely. Of the worst order.

Q. Would it not be the duty of society in the protection of itself to see to it that he is committed to an institution for the rest of his life? A. Definitely not.

Q. Why do you say that, Doctor? A. Because he is not insane.

Mr. Cahn: Just a moment. Objection. 1052

Q. Did you just not say—

The Court: He has answered. Do you object to the question?

Mr. Cahn: All right.

The Court: Pass to the next question.

Q. Did you not just testify, Doctor, that in your opinion Willard H. Phillips represents a menace to society and should not be permitted to walk out at large? A. I very definitely stated that. Very emphatically. 1053

Q. Do you not believe from what you have observed about the man, the tests you have made and the opinions to which you have come, or the conclusion to which you have come, that if permitted to remain at large that he would be a definite danger to the people of his community and their lives?

Mr. Cahn: Just a moment. I object.

The Court: Sustained.

Q. It is not your opinion, Doctor, that this is a personality who is the potential for rapes in the future?

Mr. Cahn: Objection. That is getting int the back door where it was objected to in th front.

The Court: It is incompetent and irrel vant. Sustained.

Mr. Goodman: I most respectfully excep your Honor, and I have no further question

Redirect examination by Mr. Cahn:

Q. Dr. D'Angelo, when we talk of sanity or in
1055 sanity are we not talking about the legal defini tion, that a man who knows the nature and qual ity of his act and knows that his act is wrong i sane, and one who does not know either of thos things—either he does not know the nature an quality of his act or he does know that his act i wrone—is insane? A. That's right. That's righ

The Court: Are you giving him the lega definition?

Mr. Cahn: I am asking if that is what h is talking about when he is talking about san
1056 or insane.

The Witness: That's right. I am referrin to that definition of sanity and insanity.

Q. And was it not your purpose to dete mine that in the examination of this defendant A. That was my entire purpose in my examinatio

Recross examination by Mr. Goodman:

Q. Now, Doctor, isn't it true that the definitio which was just propounded to you by Mr. Cah Cahn is strictly and entirely a legal fiction or or of completely legal origin?

The Court: That was the question that was put to him. Both of you gentlemen come up to the bench.

(There was a conference at the bench.)

Q. Doctor, is the definition of insanity as just propounded to you by Mr. Cahn one which is accepted medically? A. Medically?

Q. Yes. A. Well, that would—do you mean psychiatrically?

Q. Yes. A. Well, that would vary with the opinion of the psychiatrist. Do you want my estimation? Do you want my opinion? I cannot speak for the entire profession now. 1058

Q. I want the accepted opinion of the profession of psychiatrists.

The Court: Objection sustained. Doctor, is it possible for somebody to know the difference between right and wrong and still be psychotic? Can a person know the difference between right and wrong and still be psychotic? Yes or no.

The Witness: I would say if he knows the difference—yes, he could. 1059

By Mr. Goodman:

Q. Doctor, is it possible for a person to know that he is about to commit an act of murder, to know that as far as organized society is concerned this act is wrong, and yet be laboring under the hallucination that God has ordained him to do it and proceed to commit that crime? Is that possible. A. Sure.

1060 Q. Is that person legally sane at the time he commits it? A. Well, that is not for me to judge. All I can state is whether he has got a mental condition or not. The law determines the sanity and insanity. I would say he is definitely a mental case. He has got delusions and therefore he is suffering from dementia praecox, which is a psychosis. But the law determines whether he is sane or not.

1061 Q. The hypothetical situation which I have just described to you describes a person who though legally sane is medically insane, isn't that correct? A. No, he is not legally sane, either.

Mr. Cahn: Just a moment—
The Court: Sustained.

Q. Speaking now of this person who knows that he is taking a hammer in his hand, knows that he is about to strike a victim on the head, he knows the nature and consequences of the act he is about to commit, doesn't he? A. Yes, but he doesn't know right from wrong.

1062 Q. He also knows that as far as society is concerned the act of striking with the hammer and causing the death of the victim is wrong. That is, possible, isn't it? A. Possible.

Q. Yet because he is impelled by an hallucination that the act is ordained by God for him to do, he goes ahead and does it—do we follow each other thus far? Yes.

Q. Is it not true that this situation which I have just described describes an individual who satisfies the requirements of legal sanity but is medically insane? A. No, he does not satisfy the conditions of legal sanity for this reason: he cannot differentiate the real from the imaginary because

he has got these hallucinations or delusions and therefore he cannot tell right from wrong. He is out of contact so he doesn't know right from wrong, because he doesn't know the real from the imaginary. He has got the delusion that God has told him to kill the man, which actually is not so. So he doesn't know right from wrong. How can he?

Q. Permit me to ask you this one final question, and I preface it by asking this: you are familiar with the legal definition of insanity, are you not? A. Yes, very much so. 1064

Q. Can you tell me whether or not the legally accepted definition of insanity satisfies the requirements of the definition of insanity as prescribed by the psychiatric profession? A. Yes.

Mr. Cahn: I ask that that question be stricken out for the reason that it is irrelevant and immaterial and totally unnecessary in this case.

The Court: Objection sustained. Strike it from the record. The jury is told to disregard it.

Mr. Cahn: The People rest.

Mr. Goodman: Might I respectfully suggest 1065 that the jury be excused?

The Court: Do you rest?

Mr. Goodman: The defense rests, yes.

The Court: All right, gentlemen of the jury, you will now retire and I think we will recess until tomorrow morning. I will hear the motions this afternoon?

Mr. Goodman: Please.

The Court: We will recess this case until tomorrow morning at 10:30. Will that be all right with you, Mr. Goodman, 10:30 tomorrow morning? Is that sufficient for you?

Mr. Goodman: I think so, your Honor.

1066 *Motion to Dismiss Indictment*

The Court: All right, 10:30 tomorrow morning.

You are not to discuss this case amongst yourselves nor are you to formulate or express an opinion with respect to this trial. You will refrain from reading any newspaper accounts of these proceedings and refrain from listening to any radio broadcasts, if such there be, during this recess or any other recess until you finally deliberate in the jury room after the Judge's charge.

All right, recess until tomorrow morning at 10:30.

1067 (The jury retired.)

Mr. Goodman: If your Honor please, at this time the defendant upon the entire case respectfully renews its motion to dismiss the second count of the indictment, that which charges the defendant with common law, premeditated murder, upon all of the grounds recited in my motion at the close of the People's case, coupled with the uncontradicted testimony of Dr. Zolan to the effect that this defendant was not guilty of premeditation and deliberation with respect to the act.

1068 I submit, if your Honor please, that there is no such question of fact on the question of premeditation and deliberation present in this case as would justify your Honor in determining that it is a question of fact for the jury to rule upon, but rather, that as a matter of law it is incumbent upon your Honor to dismiss that portion of the indictment.

The Court: I thing that fact was put in issue by the testimony of the other psychiatrist.

Mr. Goodman: I respectfully submit, if your Honor please, that there was not one scintilla of evidence or one word from the last doctor with

respect to any premeditation. Not the slightest reference to it.

The Court: Motion denied.

Mr. Goodman: I respectfully except. I respectfully renew the motion to dismiss the indictment on the entire case for the reasons set forth in my original motions.

The Court: Motion denied.

Mr. Goodman: I respectfully except.

(The trial was thereupon adjourned until October 8, 1958.) 1070

Mineola, N. Y., October 8, 1958.

Before: Hon. Paul J. Widlitz, *County Judge,* and a Jury.

(Appearances as before noted.)

(Trial continued.) 1071

(Roll call of Jurors.)

(Mr. Goodman summed up to the jury on behalf of the defendant as follows):

Mr. Goodman: May it please your Honor, gentlemen of the prosecution, Mr. McCann and gentlemen of the jury: I dare say that your experience over these many days, and I am sure somewhat tiresome days, has made you to a degree learned in the law. And naturally you have come to realize in watching this trial that there is a

certain orderly procedure which is followed in every criminal trial.

First it is that the jury is selected, then the District Attorney opens to the jury and presents his theory of prosecution, and then the defendant stands up and he presents his theory of the defense, and then the prosecution puts their witnesses on the stand in direct testimony, the defense cross-examines, ultimately the prosecution rests, the defense makes certain technical applications to the Court, then the defense puts its witnesses on the stand and the prosecution cross-examines, and then we reach this point in the trial when the defense sums up to the jury.

1073

And after the defense sums up then it is that the People have their opportunity to stand and sum up. And then of course comes the Judge's charge.

So that you must recognize, gentlemen, that as I stand before you at this moment I represent the very last opportunity that the defense in this case has to be heard.. I have no opportunity hereafter from the moment that I sit down to refute a single argument that may be advanced by the District Attorney when he sums up to you, no matter how valid a refutation I may have. My lips will be sealed when I sit down.

1074

And so it is that I have the additional burden as I stand before you to anticipate the arguments which my very able adversary in this case will naturally present to you. I must not only anticipate these arguments, I must refute them before they are made. And it is for that reason, gentlemen, that I implore you to do even more of your duty than you have already assured me that you would do and which I am convinced that you will

do thoroughly and well, and that is to pay as much heed to that which I am about to say as is within your mental capacities, and to try to retain it and weigh it and measure it alongside of that which the District Attorney will say to you when it becomes his turn to sum up.

You will have observed that from the very moment that this case started, from the time that we began to select you, that Mr. Benoit and myself as defense counsel indicated that the framework of our defense would be our contention that the People have no real proof of the guilt of this 1076 defendant other than his confession, and that that confession is illegal and must be disregarded as a matter of fact and as a matter of law because it was not voluntarily and freely given.

Now, I do not want at this point to belabor that particular argument. I know well that his Honor is going to present to you fully and ably all of the legal aspects of that defense, and so I intend to pass over it. But in doing so I ask you to recognize one thing, and that is that I have not abandoned that defense, I have not renounced it. I insist that the defendant is still entitled to the 1077 consideration of that defense.

Let us now go to that which must be considered by you in the discharge of your duties. The indictment against Willard H. Phillips reads as follows:

"The Grand Jury of the County of Nassau by this indictment accuse the defendant of the crime of murder in the first defree, committed as follows:

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County

1078 *Summation on Behalf of Defendant*

of Nassau, State of New York, willfully and feloniously while engaged in the commission of a felony, to wit, the crime and felony of rape in the first degree, killed one Sunday Graham by causing her to suffocate and by choking her with a belt.

"Second Count: And the Grand Jury aforesaid by this indictment accue the defendant of the crime of murder in the first defree, committed as follows:

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County
1079 of Nassau, State of New York, willfully and feloniously and of malice aforethought, killed one Sunday Graham by causing her to suffocate and by choking her with a belt."

As the District Attorney indicated to you in his opening, this indictment consists of two counts: one, the incidental killing of this child while a felony, rape, was being committed; two, the willful, common law, premeditated murder of the child by this defendant.

This presents to you, gentlemen, an extremely grave responsibility for this reason: even though
1080 you were admonished that you were not to consider the question of punishment in your deliberations and in your verdict, the fact still remains that under the law of this state if you in your considered judgment see fit to find Willard H. Phillips guilty of the second count of this indictment, namely, common law or premeditated murder, then regardless of how you may feel on the subject, regardless of how mercifully inclined you might possibly be, regardless of how his Honor might feel, there is nothing that anybody can do under the law of this state except to see that that man walks the last mile to the electric chair.

1081

If, on the other hand, you in the sound exercise of your judgment, after reviewing the evidence in this case and analyzing the law and applying it to the facts, see fit to acquit on the premeditated murder count and consider only the felony count, and if after your deliberations it is your verdict that Willard H. Phillips is guilty of the felony count of murder in the first degree, then the law in its wisdom has seen fit to vest in you, the jury, the power to say to his Honor, "We find the defendant guilty but we recommend that he be given life imprisonment."

1082

So, gentlemen, you have to accept the fact that in your deliberations there is imposed in you the right to determine whether or not the facts and the law in this case justify either the life or the death of Willard H. Phillips.

I would like to review with you now this aspect of premeditated murder, to help you ultimately agree with my own sincere opinion that there cannot be a conviction in this case of premeditated murder.

1083

It is said in our law with respect to this common law murder that premeditation is the thought process in advance by which a person who perpetrates the act forms the purpose or the plan to kill. It is also said in our law that deliberation is the thought process prior to the act by which the defendant makes his choice as to whether to embark upon his plan or not. It is also said in our law that premeditation and deliberation require some interval of time prior to the crime, some appreciable space of time, long enough at least for some reflection and consideration by the defendant on his choice to kill or not to kill. To warrant, it is said in our law, a conviction of

common law murder in the first degree, proof beyond a reasonable doubt that the homicide was committed by the accused from a deliberate and premeditated design to effect the death of the victim is necessary, neither element alone being sufficient; and such deliberate and premeditated intention must precede the killing by some appreciable space of time, long enough at least for some reflection and consideration, for choice to kill or not to kill.

1085 And before I leave with you whether or not the People of this County in this case have satisfied these elements of the crime as I have outlined them to you, I ask you to recall and consistently carry with you the admonishment that was given you at the opening when you were selected. It is incumbent upon the People in every criminal case, and particularly in this, that every element of the crime with which the defendant stands charged be proven beyond a reasonable doubt. And that if the People fail in any one single element to satisfy your minds as reasonable men beyond a reasonable doubt, then your

1086 obligation is clear, gentlemen. You must acquit.

Let us now, if you please, analyze, the basis upon which the prosecution in this case predicates this count of premeditated murder, premeditated and deliberate murder.

First they spell out the threat: "If I am going to go out of your life I will not go alone. I will get even." They try to spell out revenge, a suitor spurned.

They come next to the belt, the belt around the throat of that poor little child.

And finally their fourth and last point in trying to establish premeditation, the forcing of the panties into the mouth of that little girl.

Let us look at these four elements one at a time and analyze them in the light of the law and of your obligations. There came upon the witness stand in this case a distraught mother. Her child was murdered, the victim of a bestial, horrible crime. She had lived a harrowing life with the man who stood accused of that senseless crime. It is perfectly understandable to accept that this was a woman who had no feeling of compassion or mercy or sympathy for this man; it was perfectly understandable that there was within her sub-
conscious mind a desire to see him destroyed for 1088
that which he had done to her and to that little child, and she did not have to be a particularly brilliant person to realize that it would be most damaging to him if the prosecution had the idea that he had threatened that child's life before he actually took it.

And so I say it is not at all something difficult to understand when she took the witness stand and testified about these two isolated threats. But let us consider the person who asked you to believe this story, and I have some sympathy for her, being a father of children myself, as any human 1089
being might have. But this man's life may very well hang upon whether or not she was telling the truth or lying. And so you as men of common sense must first analyze in determining whether or not she is worthy of belief, No. 1, her credibility, her character; and, No. 2, the possible accuracy or inaccuracy of that which she tells you occurred.

This is not a woman with an unblemished record whose word you must accept without question. This is a woman who by her own admission plays

fast and loose with truth and with morality. Sh has admitted to you an illicit relationship wit this defendant while the wife of Graham. To th degree that she let that poor little child realiz that that relationship was going on. Truth an morality were not very important to her, and say, gentlemen, that from that point of view yo do not have to give too much weight to her testi mony, from the point of view, at least of whethe she is worthy of belief.

1091 But go a step further and analyze the possibl truth of her statements. She would have yo believe that she went to this man's room, her ow home and family down the street just a shor distance away, to tell him, "Get out of my life." I don't know why she couldn't have done it o the street or over the telephone, but she went t his room to say that. She wants to end the ro mance, but, gentlemen, she has admitted to yo that she had known that defendant from the tim she was about 14 years of age, that she had lef him, abandoned him any number of times, s many times she couldn't remember. She eve

1092 divorced him. Now, if ever a woman lets a ma know that she doesn't want him or any part o him and that she wants him out of her life, it i when she divorces him. And yet she saw fit o all these occasions, and even after the divorc and even after her marriage to another man, t welcome him back again into her arms. And ye she would like to have you believe at this tim when she told him that she wanted him out o her life he was so enraged that then and there h made up his mind that he was going to go ou and kill that poor little child! This she woul have you believe!

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Phillips was a man of many women. He gratified his insatiable sex lust in many, many ways and with many, many women, and Mynita Graham was not so important in his life that when she threatened to leave it, if that is the case, that he would then and there become so incensed that he would embark upon a plan to kill that innocent child.

But look at it from another point of view. She wants you to believe that on Thursday night she went to his room and then and there told him that she wanted him out of her life, that the romance was over. And yet, strangely enough, she was in communication with him the very next day and she didn't remember whether she called him or he called her. But she does not dispute that after this horrible threat she nevertheless was in contact with him again and she saw him again not once, but twice; not twice, but three times—on Friday, and twice on Saturday. And then of course she tried to implant in your mind that on Saturday he said, "I'm going to get even."

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Gentlemen, I say that not a grain of salt can be attributed to the truth of those statements. Nobody, not an animal, can be sentenced to death on the strength of that type of testimony. Let us now pass to point No. 3, because I believe that I have now demonstrated to you that there was no threat and that there was no motive. I ask you also to bear in mind that despite all of these times that she had abandoned him and despite the divorce and despite the fact that she came back to him, at no time did he ever commit an act of violence upon her because she abandoned him, and yet she would have you believe that on this last occasion when she threatened to leave him

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that this was the motivation that brought about the threat to end that child's life.

I now want to pass to the point made by the People with respect to the belt. A great amount of weight has been placed by the People, and understandably, upon the two confessions extracted from the defendant in this case, and particularly with respect to the use of the belt. And you may very well recall that while Mr. Cahn was conducting that astute examination of Phillips at 5:30 to 6:30 in the morning it was he that
1097 said to Phillips, "And you put the belt around her neck to make sure she was dead?" And you will recall the answer of Mr. Phillips, "That reasoning on your part is as good as anything I could give."

Mr. Cahn would have you believe that the belt was put around the throat of that child after the rape was concluded for the purpose of killing the child so that she could not identify this defendant. Gentlemen, the physical facts in this case from the testimony of the People's own witness completely disavow that theory. It is out the window!

1098 Dr. Lukash, the County Medical Examiner, who made a thorough investigation of every one of the medical aspects of this case, took the witness stand and he described the cause of death. And although it cannot have pleased the prosecution, you will recall his testimony. The belt was loosely around the neck of the child. There was barely any evidence that the belt was even in contact with the throat of the child. The belt in no way contributed to the death of the child. If she died, as she did, of asphyxiation and suffocation, it was from the panties in the mouth, not the belt.

So let us pass to the last hope of the District Attorney to pin a convicion of premeditated murder on the panties. No one can dispute that those panties were forced by a man of real strength down the throat of that child and caused that child's death. And the facts demonstrate that it was Phillips who did that forcing, but I would ask you to tell me in your own good consciences, in your minds and in your hearts and in your reason, whether or not you can sit there and state that Phillips premeditated and deliberated and said to himself, shall I kill this child or shall I not? before 1100
he actually took those pants and forced them into the mouth of the child.

Gentlemen, this was an act of animal passion, of lust in its completest vileness—bestial! This was not a reasoning man doing something, this was an animal at large, and there was only one thing that was going through that clouded mind of his at that moment. He had to gratify his animal lust and he had to stifle that child from screaming, and that was his only purpose in forcing those panties into her mouth.

I have but one further observation to make with 1101
respect to this count of premeditation. There were on the witness stand all of yesterday two men learned in the profession of medicine and specializing in the field of psychiatry. One of the defendant's specialist, one of the People's specialist. They may have had some different interpretations as to what motivates this man, and they may have put it in different medical categories, but one thing is very, very clear and very, very true. They both had to say that in our parlance, the words that you and I understand, this is a sex maniac

sitting there (indicating), a fiend. And Dr. Zolan said that from his intensive study of this man, all of the observations and the tests that he made, that this man was incapable of premeditation with respect to the death of that child and the placing of the panties in her mouth.

And, gentlemen, the most important aspect of my argument: Mr. Cahn did not dare to ask Dr. D'Angelo whether in his opinion as a man learned in the field of medicine was the act of Phillips premeditated? What you have before you as part
1103 of the evidence in this case is the uncontradicted testimony of this expert that the act was not an act of premeditation and deliberation.

Gentlemen, I trust that by this point I have convinced you, as I am convinced, that you cannot under the law and under the facts find this man guilty of premeditated murder; that you must turn to the consideration of whether or not he is guilty of the other count of the indictment, the felony murder. I am going to be realistic. I am going to assume the worst, and I am going to think only in terms of the possibility of your ver-
1104 dict of guilty of felony murder in this case, and as to whether or not you should see it in your minds and your hearts and your consciences to come back into this court if you bring in such a verdict to recommend to his Honor that this man be given a life sentence.

Analyze the individual who is on trial. Is this a normal person? Is this a person who coolly and calmly and deliberately set about to commit a murder, a senseless death? Or is it the sex fiend who was so vividly described to you by Dr. Zolan on the witness stand yesterday? Isn't this a man

who admits to you every conceivable type of sexual deviation and abnormality? Commencing sex experiences at the age of 11 years of age, homosexuality a short time thereafter, or so many rapes upon little girls he can't remember how many there were! Do we need doctors, gentlemen? Do we need psychiatrists to take the witness stand and get money for it and try to tell you that this man is not right? Haven't we got common sense? Don't we know that he, like all too many others, is a sex fiend or maniac? There cannot be any other answer but that. 1106

He had no purpose in this killing but lust, and lust alone. And I say to you this, that although it may have been his hands which brought about the death of Sunday Graham, the responsibility for that horrible crime rests not with Willard Phillips but with the People of the State of New York, and I am going to tell you why. He may have perpetuated fifty different rapes and got away with them. But there came a time when he did not get away with one, in 1946. At knifepoint he raped a white girl in this county and he was sentenced to State's Prison. Nobody up there 1107 apparently thought it important enough to look at this man and find out what makes him tick. Is there a danger that if he walks the streets a free man again that he will go it again? No, they didn't do that. They let him off on parole, and within a month after he is out on parole he commits another sex offense. He molests a little four or five-year-old girl. Back to State's Prison! And again with this second piece of evidence that should have been important to somebody, he is

permitted to remain in jail and then ultimately released to bring about the death of Sunday Graham!

Gentlemen, when you analyze a crime and what you are going to do with the defendant you are dealing with crime and punishment. As intelligent men you have got to say to yourselves: if he did it what is the punishment that he must suffer and why should we impose it? There must be reason. Are we living under the old philosophy of an eye for an eye and a tooth for a tooth, or
1109 do we have other reasons for determining whether or not a man of this sort lives or dies? Will the death penalty bring back Sunday Graham? Will it stop other sex fiends from walking the streets and perpetrating the same kind of horrible act?

On the other hand, I say to you gentlemen that maybe the death of Sunday Graham will not be in vain and maybe a recommendation of mercy on your part may not be in vain if that man is permitted to live for the rest of his life behind bars where psychiatrists may study and observe and find out what it is that motivates this animal.
1110 And if they make but one little minute discovery of what it is that causes sex deviates, sex maniacs, then Sunday Graham will not have died in vain, and you will have been justified in seeing to it that he was not given the supreme penalty. And I submit that one little possibility is worth the effort.

It is conceivable that the District Attorney is going to argue when he gets up that I am pleading for mercy for Willard Phillips. My answer to that in advance is this: if I am pleading for mercy it is for a creature of God, not for Willard Phillips.

But beyond that, if Mr. Cahn is going to say to you, as I presume he may very well, give him the same mercy that he gave to Sunday Graham, then my only answer is, gentlemen, if we are going to permit ourselves to stoop to the same type of barbaric conduct in seeking for revenge upon this man, then we have not advanced very far in civilization.

Let us just analyze what is going on in the world today and what we are doing about it. There walk upon the streets not only of this county but throughout the entire country and the 1112
world sexual deviates, homosexuals, rapists who prey upon our young, contaminate their morals, ravish the helpless female, and sometimes, as in this case, actually bring about her death. This is our problem, gentlemen, and what are we doing about it? When we apprehend them, if we are lucky enough to do it in one isolated act, we put them behind bars like a caged animal. And when he has served out his allotted time he is permitted to walk free again in our streets looking for another victim, another prey, until again he is apprehended. And if by chance his sexual deviation in 1113
any particular instance goes so far as to bring about the death of the victim, then we take it upon ourselves to destroy him, to take his life away, and complacently say to ourselves that we have done our duty.

Gentlemen, when we are we going to come out of the dark ages into a day of enlightenment when we can realize that these people, like victims of cancer and typhoid, are sick, and, like victims of typhoid, they are a menace not only to themselves,

but to the people, to their potential victims? When are we going to say: Let us recognize this as an illness, let us study the condition, let us put science to work to find out what causes it in the first place? How can we cure it or at least arrest it or prevent it before it does damage to some innocent victim? This is the answer to this sort of thing, gentlemen, not the electric chair!

And with this I leave you. When I assumed the responsibility, together with Mr. Benoit, to de-
1115 fend this man, as I indicated to you I accepted that responsibility with full knowledge of its gravity. I don't know, I cannot measure the extent to which I have fulfilled my responsibility, but I can assure you all that Mr. Benoit and I gave to this case all that we had within our limited ability. And now it is time for us to sit down and pass over to you the responsibility which we have been carrying up to this point; namely, to see that every defendant in the State of New York gets a fair trial, that every possible constitutional safeguard is thrown about him.

Gentlemen, I pass that responsibility over to
1116 you and I want to assure you that both Mr. Benoit and myself are very secure in our confidence that your duty will be faithfully and well discharged.

Thank you.

The Court: There will be a ten-minute recess.

Gentlemen of the jury, do not discuss this case among yourselves or formulate or express any opinion until after the Judge's charge when you retire to the jury room to deliberate.

Ten-minute recess.

(A short recess was thereupon taken.)

(After recess.)

(Mr. Cahn summed up to the jury on behalf of the People as follows):

Mr. Cahn: With the Court's permission, Mr. Goodman, Mr. Benoit, Mr. McCann and gentlemen: "I ask not for mercy for Willard Phillips. I ask for mercy for a creature of God." This is beautiful! Eloquently delivered, but no defense to a murder. Even more than that, it borders on the blasphemous. 1118

Gentlemen, it is with the full realization and understanding of the responsibility on my shoulders that I am addressing you this morning. Although this is not the first time that I have come before a jury and asked for the penalty which flows from this crime, I can assure you that the weight of the burden does not become any lighter. But I have taken an oath as well as you have, an oath under the laws of our state, and if either of us, if either of us, gentlemen, discards our responsibility, if either of us casts aside the duties which have been placed in our hands, our system of 1119 justice is destroyed. It is destroyed for we no longer have a government of laws; we have a government of men. And, gentlemen, a government of men provides no protections and guaranties not only for this defendant, but for all the people of our state.

With this in mind, gentlemen, and with the reminder that you assured me that you would deliberate and render a verdict based solely on the evidence adduced here in this courtroom and the law as you get it from the Judge and the Judge alone, no matter what your personal opin-

1120 *Summation on Behalf of People*

ion of the law may be, no matter what Mr. Goodman's opinion of the law may be, and that you would do so without sympathy, prejudice, or thought of punishment, let us proceed, with your kind permission, with a discussion of the evidence.

First, again with your permission, may I say that the defense offered in this case took on the aura of a game of tag or hopscotch. Let us throw out a lot of defenses and maybe the jury will reach out and touch one and say, "You're it."

1121 First we heard a great deal of discussion about the violations of the constitutional rights of the defendant. Well, gentlemen, they obviously knew a confession was forthcoming and therefore every attempt had to be made to show in some small way that the confession was involuntary. There were questions about threats, there were questions about beating, there were questions about Judge's telephone numbers and telephone books, all to no avail.

Then the confession is offered in evidence, and, lo and behold, there is a rude awakening. The

1122 police did not get the confession; the District Attorney, represented by myself, did. Oh, well, we cannot go as far as to say the District Attorney beat him; we cannot go as far as to say the District Attorney threatened him, so without even reading the confession at the time it was offered Mr. Goodman asks Mr. Birchall these questions, with the hope of indicating that when the police had the defendant ready to confess, then and then alone did they call in the District Attorney.

"Q."—on page 235, sir. "But you weren't called into the room until he was ready to confess; isn't that right?" This question was asked of

Mr. Birchall on the witness stand. "A. No, that is not so.

"Q. What is so, then, Mr. Birchall? A. Because he didn't confess when I first came into the room." Bing!

"Q. Do you have here transcribed everything that was said from the time you came into the room, Mr. Birchall? A. I have everything that was said in my presence from the time I came in the room until the defendant left the room.

"Mr. Goodman: I will now ask for a recess for an opportunity to read this." 1124

Now Mr. Goodman asks to read it.

Gentlemen, you heard the confession and I am sure that you will agree that that disposes of that contention. So much so, gentlemen, that when Mr. Goodman put Mr. Phillips on the witness stand he did not ask one single question as to who beat him, not one single question was asked of Phillips as to who threatened him. And, gentlemen, that was for only one reason, because Mr. Goodman then knew that this defense was out the window.

Gentlemen, there was only one thing violated in this case, and that was the chastity of Sunday Graham. 1125

But let us for the moment remain with the constitution. What is the basis, what is the reason for our great constitution? If we go back historically we remember that it was to guarantee the right to life, to liberty, and to the pursuit of happiness. Who denied that to Sunday Graham? Who denied her the right to her life, the right to her liberty, the right to her pursuit of happiness? This man (indicating) who has the audacity to come before us and say, quote, I was brainwashed, unquote!

1126 Well, that defense doesn't click, so we have got to go to another one. What shall it be? Deception! This defendant deceived his own lawyers and his psychiatrist. So these questions were asked of Willard Phillips, page 299: "Did your grandparents treat you in a way that you regarded as proper? A. Well, they did to the best they knew how.

"Q. Were you happy with them? A. Yes.

"Q. Did you discuss your childhood with Dr. Zolan? A. Yes, sir.

1127 "Q. Did you tell him that you were not happy and that you felt that your grandparents were abusing you?"

And after an objection Mr. Goodman states: "For the sake of expedition, if your Honor please, I think it most important at this point that everyone recognize one thing, and that is my obligation to spell out during the course of this man's testimony inconsistencies of his to myself or to the doctor, in order for the jury to determine what, if anything—" and at that time an interruption by the Court telling him to proceed.

1128 "Q. What, if anything, did you tell Dr. Zolan about your childhood with your grandparents? A. I don't remember exactly.

"Q. Did you tell him that you felt ever since you were old enough to recognize and understand that your grandparents preferred the other children to you?"

Then there is some colloquy between counsel and myself, and the answer is: "I don't know whether I said it in that wording or not, but that was my intent, I guess."

And then further on page 332 and 333, a statement by Mr. Goodman: "If your Honor please,

I would most respectfully submit that evidence of deception on the part of this man towards his own counsel is of great significance in so far as the doctors are concerned in aiding this jury."

And then this question, later on, at the bottom of page 333: "Did you tell us that Mr. Cahn and Mr. Lockman questioned you for almost an hour with Mr. Birchall, in front of you, before you broke down and confessed? A. Yes, sir.

"Q. You told us that? A. Yes, sir.

"Q. Are you sure, now, Phillips? A. Yes, sir.

"Q. Did you tell us that when you confessed 1130
you asked that the police officers be brought into the room and that you stood up and shook hands with them before you confessed? A. Yes, sir.

"Did you tell us that, too? A. Yes."

That defense just blew out the window, and it was important because those very things, gentlemen, indicate the voluntariness of that confession. But we had to get rid of that defense quickly.

Well, now, what next? What other defense can be raised? We cannot claim insanity, for the law in New York is well settled that if a man knows the nature and quality of his act and knows that 1131
his act is wrong he is legally sane and is responsible for that act. And Dr. Zolan and Dr. D'Angelo both agree that he knew the nature and quality of his act and that he knew that his act was wrong. Therefore, no insanity.

What else? Well, now, look here and look at this. Sociopathic personality. Well, it doesn't spell out insanity, but perhaps we can use it in a different way, to dispel premeditation, to instill sympathy. Maybe in some other way. Anyway, the word sounds terrible.

1132 *Summation on Behalf of People*

Now, gentlemen, with your permission before I proceed to the discussion of this particular phase, may I, with your permission again, discuss the two counts of murder in the first degree? In the second count of this indictment, the common law murder count is charged, as Mr. Goodman so eloquently explained to you. It requires premeditation, deliberation, and the intent to kill, and if so found by you beyond a reasonable doubt Mr. Goodman is correct in that the jury is not
1133 permitted in any way to recommend life imprisonment.

The first count of the indictment—I believe the first count is the common law count?

Mr. Goodman: No, it is the other one, the felony.

Mr. Cahn: (Continuing) The first count of the indictment is what we term felony murder, meaning the killing of a human being while in the course of committing a felony. No premeditation is required, no deliberation is required, no intent to kill is required, and even if committed in the heat of passion it is felony murder if there
1134 is a killing of a human being while in the course of committing a felony.

Taking Mr. Goodman's statement, there is little that he can do with that. He is going to be realistic. But in this particular count the jury, if they so desire, can bring in a recommendation of life imprisonment.

We agreed at the beginning, gentlemen, that it was the duty and burden of proof of the People to prove the defendant's guilt beyond reasonable doubt. I am sure you will also agree that the People have proved this even by a higher standard,

beyond all doubt. We know from the testimony of Dr. Lukash that Sunday Graham was raped, from the condition of her vagina, of her hymen, and the varginal orifice, and the discovery of sperm in the vaginal canal. We know also from Dr. Lukash that Sunday Graham died as a result of the pants stuffed into her throat, all the way down her throat, causing suffocation and death. We have the confession, People's Exhibit 28 in evidence, of the defendant, that he raped Sunday Graham and he put the pants in her mouth, causing her death. 1136

I could go into a long discourse, gentlemen, of the fingerprint on the car, the peanut shells in the defendant's car and in Sunday Graham's hair, the hair found on her body and on her little panties, the hair found in the car. But it all becomes academic, even the confession, because when that defendant took the witness stand and told you his story I am sure you will agree he confessed once again to the crime of murder. When you look at it, even the question of involuntariness of the confession becomes academic, because you certainly can take into consideration in your deliberations 1137 and in your verdict the testimony of the defendant from the witness stand.

And even if those pants were not used with the intent to kill, the fact remains that those pants were shoved down Sunday Graham's throat by this defendant during the course of committing the felony of rape upon her, forcible rape, and that these pants caused her to suffocate and die. Proof of felony murder not only beyond a reasonable doubt, but beyond all doubt! Even to the satisfaction of Mr. Goodman!

Now, let us proceed, if you will, to the count where premeditation, deliberation and intent to kill are required. There was offered for your consideration the testimony of Mynita Graham. Gentlemen, let us not forget that we do not sit in judgment of Mynita Graham. Her morals, her life is not for us to condemn today. She must answer to her own conscience and to a Judge and Jury far wiser and far more powerful than ourselves.

1139 But she testified that after having this relationship with the defendant Willard Phillips there came a time when she said, "No more. It's over. Get out of my life." And the defendant, she said, stated, "If I go I will not go alone." Further, she saw him not Friday, gentlemen—and let me say at this point that neither counsel nor myself will intentionally misquote any evidence, but if you feel that what we have said is different from your recollection, gentlemen, it is your recollection that controls. As you were told time and time again, you are the sole judges of the facts and no one is permitted to interfere in that province.

1140

She said she dd not see him Friday; she saw him Saturday at the Safeway and then Saturday night outside a drugstore on the street. And again she told him, "Look, it's all over," and again he said, "I'll get even."

And the defense states and the defendant told you, no, number one, she never said it. "I figured we were going to get married after she got rid of Curtis Graham. That was never said." And, number two, "If she said it I didn't make the threat because I wouldn't get angry. She has

left me many times before. I didn't do anything any of the other times when she left."

Mr. Goodman also states in summation that Mynita Graham was not important to the defendant. Well, you know, it takes two to make a bargain. True, Mynita came back to Willard Phillips on a number of occasions, but there was Willard Phillips waiting to take her back. Apparently there must have been some importance to Mynita Graham, even if it were only to commit these alleged sexual acts which deviated from the norm of society. 1142

Yet the defendant takes the stand and tells us that Sunday talked to him about her mother leaving him. Mr. Goodman told you that Mynita Graham saw fit to tell Sunday about this relationship. Well, you cannot be on both sides of a fence at the same time.

Page 336, at the bottom of the page:

"Q. Where did you drive with her?" This is the defendant testifying on direct examination. A. Well, I drove up Greenwich, through Roosevelt and through Merrick, down to Bellmore.

"And during the drive—after I bought the ice cream and began to eat it she began to tease me about she won't see me any more. 1143

"I said, 'See who?'

"She said, 'Mama and I and Mike. We won't see you any more.'

"I said, 'Why?'

"She said, 'Mama said she's not going to see you any more.'

"I said, 'When did she tell you this?'

"She said, 'Saturday.'

"I said, 'After you left me Saturday?' She says yes.

"I said, 'Why would she tell you that?'

"She says, 'I don't know, because mommy says everywhere she goes you show up. And she is not going to see you any more.' "

Does this lend credence to what the defendant would have you believe, or to what Mynita Graham testified on that stand? This is from the lips of the defendant! The very thing which this
1145 defendant denies he tells you takes place with little Sunday Graham!

And then let us go to the second point: "Even if she said it it wouldn't get me angry." If you remember, gentlemen, Dr. Zolan testified that the defendant told him that because Sunday kept telling him this he slapped her. The mere repetition of this story by this little child caused him to lose his temper to the point of slapping her. Can you imagine how he felt when he heard it from the lips of Mynita Graham herself? Did that ever take place? Indeed it did!

And then we find him on Monday morning on
1146 Cruikshank Avenue. Why? For what purpose? For what other purpose, gentlemen, than that of picking up Sunday Graham whom he knew took that route and carrying out the threat which he made to Mynita Graham? You heard his first statement giving the routine he followed on that particular day. No plan, no routine. The only appointment he had that day was with the waxing company. Then why down on Cruikshank Avennue? "Sunday Graham accosted me."

He then tells us in his confession that while raping her in the back seat he put these pants in her mouth to stop her from screaming. Gentle-

men, if that were the intent would it take the pants or would it take the hand of Willard Phillips over her mouth? And even if the pants were used wouldn't a small portion of these panties in the mouth cause her to stop screaming, which in fact it did? But look at the physical evidence in this case, gentlemen, People's Exhibit 16, and look how far down the throat those panties are. A difficult task in itself to get even a part of those pants into a struggling little eight-year-old mouth! But Willard Phillips saw fit to take all 1148
of these pants and shove them all the way down her throat. For what? To stop her from screaming? No! To kill! The screaming stopped, as he tells us, but the gasping and the groaning and the gagging remained.

Gentlemen, this was in the process of carrying out the threat which he made to Mynita Graham, and now coupled with the knowledge that he had to kill or suffer little Sunday Graham to come into court and point to him and say: This is the man who did this beastly act. One experience was enough. This was not going to happen again.

And, further, Dr. Lukash did testify that the 1149
belt had little or no part to play in her death. For no other reason, since she was already dead or in the process of dying, dying from suffocation from these pants. Mr. Goodman makes a big deal out of the belt being loose around her neck. I have a suit, gentlemen. My arm up here (indicating) is probably even a little thinner than Sunday Graham's neck, but look where the holes in this belt are, and if the holes were not used, look at the twist in the belt itself (indicating). And that belt would remain tight so long as the

defendant held it, but would loosen up, of course, when he let it go. We are not claiming that the belt was the instrument of death. We claim just exactly what Dr. Lukash states, that it may or may not have played a small part in the death. But that little mark was because she was dying or already dead. Therefore no greater mark.

But what does the defendant say in reference to this belt? Number one, on page 31 of the confession, questioning of the defendant by myself: "All right, now, after you finished inside of her
1151 what did you do?" Any suggestion there as to what the answer should be? No!

"A. Took her belt and put it around her to stop her from fighting and going on."

The belt, gentlemen, was placed around her neck after the defendant had finished his act, after the panties were put into her mouth.

And on page 40: "Q. Well, then, afterwards you took her belt and you put it around her neck, didn't you? A. I told you that.

"Q. Well, that was to make sure she was dead, wasn't it, Mr. Phillips? A. That reasoning on
1152 your part is as good as anything I could give. I don't recall having any reason whatsoever. It possibly is true."

His failure of memory creeps up again, as it did on the witness stand before you. This convenient memory, of remembering all that will help him and forgetting all that would be harmful!

If it was to make sure she was dead, gentlemen, then what was the purpose of putting those pants down her throat into her trachea? To kill! What other reason could there be? The defendant had finished, the screaming certainly had stopped, but he wanted to make sure that his intent was carried

out, the threat he made carried out, and that he would no longer have to worry about identification from little Sunday.

But the defense says no, because they know the argument is strong. No, he is a sociopathic personality and there was an irresistible impulse. Therefore no premeditation, no deliberation, no intent to kill.

In support of this confession they put the defendant on the witness stand, and what does he prove? Four things, gentlemen: he is a liar, a rapist, a murderer, and one who would tell you anything he wants to tell you if he thought it would help his cause. And that's all he would do. 1154

And, further, Dr. Zolan testified. And, gentlemen, I will be the first to agree that Dr. Zolan is sincere in his opinion. But it was based on an unsound foundation, a pack of lies, a story which he could not possibly know was true or false. And by Mr. Goodman's own questioning of Dr. Zolan, he asked him: "Did you try to elicit the truth from the defendant?" He said yes. But Dr. Zolan had no way of knowing what was true and what wasn't. 1155

He says first that in his opinion the defendant is a sociopathic personality. With this we have no quarrel. He is. And Dr. D'Angelo agreed. And whether it is a behavior disorder or a mental disorder, very frankly I believe—I am not sure even at this moment in my own mind, but I do believe that becomes unimportant, for both Dr. D'Anglo and Dr. Zolan agreed that a sociopathic personality can premeditate and can deliberate.

But Dr. Zolan stated that in his opinion this act was the result of an irresistible impulse, and he based his opinion on a number of things, among

others, one, he had intercourse at an early age, 11 or 12, which the doctor definitely admits indicates merely an early experience in sex. And what of the girl Willard Phillips had intercourse with? Is she on trial for murder? Do we know that? Is she a sex fiend? Do we know that?

Second, homosexuality, which happened maybe four times, according to the defendant, if we are to believe him, three of which again happened when he was 10 or 11 and one possibly in his teens. And Dr. Zolan admits that that is the age when
1157 it is not uncommon.

He is unable to state with how many women he had intercourse. Gentlemen, there isn't only in our society—we frown upon it, we consider it antisocial, but we do not leave our common sense outside when we try to deliberate. I assume you and I know and you will agree that there are many, many men who not only could not answer that question, but wouldn't answer it. And they are not on trial for murder.

He had extramartal relations. He says that that is not normal, not accepted by society. If all
1158 who had extramarital relations, gentlemen, were on trial for murder the prisons would not be big enough any place. No question but that it is improper conduct in so far as society itself is concerned, but no reason to kill.

Then he tells us he had committed between 25 and 50 rapes. Now, gentlemen, I must stop here for just a moment. He believes that. I don't know what the defendant considers rape, but in our state there must be resistance to the utmost by the female defiled, or she must be under the age of 18. And according to his own statement: "Well, a little resistance is expected from a girl."

But can you possibly believe that this man is capable of getting away with between 25 and 50 rapes? It is ridiculous! Our society just isn't built that way, either.

And yet Dr. Zolan believed it, and that is his privilege. I don't think down deep in his heart he really does believe it.

We come to his prior conviction, and the doctor says that that was the result of an irresistible impulse. This attack on the girl walking on the golf course, which he completely denied up until this very crime, and for which he served ten years. 1160
Dr. Zolan says irresistible impulse, an overwhelming desire came upon him when he saw this girl. Is it not strange, gentlemen, that after riding in this car, passing probably hundreds of women, that this overwhelming desire came upon him only when he saw this girl alone walking in the golf course? Isn't it strange? No, he knew and felt that this time he might get away with it. And he stood trial and never admitted it until almost twelve years later. Irresistible impulse!

Then we come to the touching of the little girl's genitals in Levittown. And Dr. Zolan said that 1161
the defendant told him he tried to push the girl away and in doing that touched her genitals. And Dr. Zolan says he interprets this as an irresistible impulse. And yet when the defendant told him that while in the car with Sunday Graham he intended to touch the genitals and play with the private parts of Sunday Graham—her pocketbook, if you will—this was not the result of an irresistible impulse.

Gentlemen, is this science? Is this logic? What in any consideration is the difference? And Dr.

Zolan tells us that this crime was the result of irresistible impulse from playing with Sunday Graham's private parts, although the playing with the private parts was not the result of an irresistible impulse, was not the result of a sex fiend. Well, who forced him to do that, if he did, if that was his intent, with which I don't agree?

But taking Dr. Zolan's testimony, who asked him to play with the genitals of Sunday Graham causing the so-called irresistible impulse? A man is presumed to intend the natural consequences
1163 of his acts. That is the law. And he took it upon himself, under every color of the testimony, to play with her private parts. Nobody forced him then. No irresistible impulse, no overwhelming desire. And they ask you to excuse him, therefore, for what followed, as a result of that. How low can you get?

But did he in that car intend to play with the genitals or the private parts of Sunday Graham? Well, let us look at what he says. Number one, he tells us in his confession that he decided to have intercourse with Sunday Graham on Green-
1164 wich Street. One block away from Cruikshank Avenue! This overwhelming desire! Then he sees fit to decide to buy her ice cream and take this drive.

But let us for the sake of argument say, no, he didn't have the desire on Greenwich Street—and I wish you would remember, gentlemen, that this statement was taken May 14th; the story he told to Dr. Zolan started September 7th. A great amount of time for reflection in so far as the defendant is concerned as to what could happen to him and what he could do if he said certain things.

I say that what he told us in that statement was true, and for another reason which I will come to in a moment. And I hope you will forgive me for taking this amount of time, but I am sure you realize the responsibility which is mine and the responsibility which will eventually be yours, and I have got to sit down with a clear conscience knowing in my mind that I have done the very best that I could.

Let us for the sake of argument, then, gentlemen, say he had this little to do with Sunday Graham in the front seat of the car and then told her 1166
one of two stories: either you stop crying or I'm going to play with your pocketbook, meaning her private parts; or the story that he gave us here in the courtroom; tell me the truth or I am going to play with your pocketbook.

Another indication of the defendant telling you what he thinks you would like to hear, in order to bolster his defense. I don't know which is true. I say neither story is true, and that he had the desire at Greenwich Street. But take either story. If that is what he intended to do, gentlemen, would he himself get into the back seat of that 1167
car and drag Sunday Graham into the back seat of the car, just to play with her genitals, just to play with her private parts? I am sure we are not stupid, gentlemen. He could have done that right where he was, just to play with her private parts. He doesn't tell you that after he played with her private parts then this overwhelming desire came upon him and then he pulled her into the back seat. Nowhere! Not to Dr. Zolan, not on this witness stand does he say that happened. He decided to play with her genitals and then

pulled her in the back seat and started to play with her genitals.

And he remembers pulling down her pants, getting on top of her, and, bang, the memory stops. How convenient! How shrewd! And then the shock. What shock? Here he tells us the sperm he saw on Sunday's dress; to the doctor he says the sexual climax itself.

In any event, is that a shock at this time? Again People's Exhibit 28, gentlemen. When did he put that belt around her neck? After he finished,
1169 after the shock. Did he know what he was doing then and did he intend to make sure Sunday Graham was dead? The shock is over now. But now he would have you believe, "No, I saw the belt in my hand"—his left hand—"when I came out of this shock."

I say to you, gentlemen, he got out of that front seat and into the back seat and pulled Sunday Graham into the back seat with him not to play with her genitals or her private parts or her pocketbook or her anything; he intended to rape her, she fought him, she screamed, she said, "Take
1170 me home." But he got her into that back seat for more room to fight. And he raped her and he killed her.

I asked Dr. Zolan: "Isn't that a possible motive for pulling her into the back seat?" And he says, "Well, I can't tell you what his thought process was. I can't tell you what he intended at that time."

And you heard from Mr. Goodman, with whom I wholeheartedly agree, that premeditation and deliberation is a thought process. Dr. Zolan tells us he can't tell the thought process in one instance, but he can tell it to us in others.

Gentlemen, not so. If you can't get into a man's mind to determine what he is thinking at one time, you can't do it at another. They can question to determine maybe what kind of personality a particular person is, they can question to determine from their acts and their behavior whether they know the difference between right and wrong and whether they know what they are doing and are in contact with reality, whether they have delusions or hallucinations. This they can do. And on this they agree. There is no question about his loss of contact with reality. But Dr. Zolan cannot get into that mind and say he can't premeditate or he couldn't premeditate, or he didn't premeditate and didn't deliberate. It just can't be done. You can only go by acts, acts which the man performs, and that is why the law presumes that a man intends the natural consequences of his acts. If one points a gun at another's heart and pulls the trigger do you know what is in his mind at that particular time? No. But you know by pointing at a man's heart and pulling the trigger—you presume that he intends the natural consequences of his act, to kill. That is how you spell out premeditation, deliberation and intent. Not by any guesswork, not by any sociopathic personality or psychopathic personality, or what have you.

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And then he adds this theory, the keeping of the body in the car while he went up to fill out the form of application for his job, that that indicated that he wanted—not only indicated to him, but the defendant told him that in a way he wanted to get caught. And then I asked him, "He wanted to get caught?" "Yes." "Well, Doctor, does this coincide with the fact that he denied his guilt

for sixteen hours?'' No, that doesn't coincide! Can there be any doubt about that? Mr. Goodman has been yelling about it all through this trial. No, it doesn't coincide!

Well, he did get caught. What happens to this theory? What happens to the theory that he wanted to get caught?

That is number one. And, number two, he told the police and he told Dr. D'Angelo that he threw that body behind those warehouses before he went up to Mineola. But on September 7th, 14th and
1175 28th, with plenty of reflection and the possibility of using sociopathic personality, it is a different story. ''I had it in the car.'' Not only in the car, but on the back seat. And in his confession to Detective Stark, whom he called a liar, he puts in that that body was taken out by him on the floor of the car, in the back. But reflection after months of thinking as to his defense led to a change now and it becomes, ''Well, I was up at the waxing company office at the time that Sunday was in the car on the back seat, parked in Mineola.'' And this indicated he wanted to get
1176 caught!

Number two, he went looking for Sunday. And he testified in court he thought he would find her. ''Dr. Zolan, what does that indicate?'' ''Remorse, in a vague sort of way.'' ''Doctor, could it also indicate that it is also a clever way of casting off suspicion from yourself?'' ''It could be.''

You saw this defendant on the witness stand, gentlemen, you see how shrewd he is, how clever, with a 111 IQ, sociopathic personality or not. That has nothing to do with the intelligent man, according to Dr. Zolan. It indicated remorse!

And I asked Dr. Zolan: "Doctor, would making the sign of the cross before he gave the confession, and calling for a priest thereafter indicate remorse in a real way rather than in a vague way?" I couldn't get yes and I couldn't get no. "Well, maybe he needed divine help."

I am not going to quarrel with that statement, gentlemen. We cannot give divine help, and I think we all realize that his acts in accordance with his religious faith indicated remorse in a real way, indicated that what he told us on May 14th when he finally got it off his chest, not only 1178 in so far as this crime, but his other crimes were concerned, showed that his inclination was to go to his spiritual leader, his priest, which permission was readily given to him. We don't have to guess about that, gentlemen.

Irresistible impulse! Gentlemen, there is no denying it because we don't know the true facts of what happened in Dublin, Georgia, or in Florida, but even going along with what Mr. Zolan testified to and what the defendant testified to, what does it show? That Willard Phillips has a strong, powerful sex drive, and, even more than 1179 that, a powerful, strong sex capacity. And that is all. He is a mean man because he will satisfy that desire, satisfy his lust, and it doesn't matter to him whom he hurts. Sex fiend? No! No! Some men drink too much, some men smoke too much, others work too hard. He has a personality trait which is also against the accepted norm, the accepted mores of society. And it is not that he can't control it; he will not control it.

Gentlemen, there is no question but that this defense was attempted not so much now to dispel

premeditation and deliberation, because the proof, the physical evidence is much too overpowering —more overpowering than his sexual desire. But it is for you to take into consideration hoping that you will throw that premeditation out and convict solely on the felony murder count, in which count it is within the province of the jury to recommend mercy.

Now, gentlemen, it is a difficult position which I am in, and I am sure you realize it. Here Mr. Goodman eloquently asks for mercy and I am here
1181 to give you the facts and ask for the extreme penalty. It might appear ghoulish in a way, but, as we stated before and as we understand it now, I am sure we are a government of laws, not of men. Gentlemen, the defendant, Willard Phillips, did not come in here and say, "I did it. I couldn't help it. Forget everything else. I did it." He didn't come running to the police and say, "Look at this, what I did. Look what these hands of mine performed. Help me." No, he came in and dragged Mynita Graham through the mud, he came in and desecrated his own mother. Who
1182 in the world would care whether his mother was married to his father or not? But he used that, he stooped that low into the sewer to connive and to trick and to spread the seed of reasonable doubt, hoping that with a little nurturing, a little care, it might blossom into a flower. Gentlemen, all that it turned up was crabgrass.

Is this a man deserving of consideration? It was never Willard Phillips; it was his mother, it was his uncles who get more attention, it was Mynita Graham, it was Sunday Graham who accosted him and teased him, and now it is the

People of the State of New York. Everybody is out of step in this parade except Willard Phillips! And he has the audacity to come before you and say now, "It isn't my fault; don't blame me." Will this bring back Sunday Graham? Of course not! Will it stop others like him? I don't definitely think so. But one thing I do know, gentlemen, it will stop Willard Phillips! "Maybe Sunday Graham didn't die in vain." "Maybe Sunday Graham didn't die in vain." How dare he? Regardless of premeditation, regardless of deliberation, regardless of intent to kill—take that 1184
away, if you will, you still have this felony murder which Mr. Goodman agrees took place, and he agrees that the defendant is guilty thereof. Taking it from that standpoint can he go any further?

Gentlemen, my duty is over, the burden that has been resting upon my shoulders is lifting and being placed upon yours. And your duty and your responsibility is about to begin. The burden which the law requires, that the People prove beyond a reasonable doubt the guilt of this defendant, I think has been met. And a reasonable doubt, gentlemen, is just that. A doubt with reason. 1185
Not a whim, not a guess, not a surmise, nor is it an excuse to avoid performing an unpleasant duty. Prosecution may be unpleasant, but it is a duty that must be performed under our laws, as well as a duty that you have that must be performed under the laws and guided by those very laws which you will receive from the Judge and from the Judge alone. Regardless of society, regardless of the People of the State of New York, regardless of what Mr. Goodman may think should be done.

1186 *Summation on Behalf of People*

And it is possible from the evidence adduced, gentlemen, and I know you must be thinking about it, that from the evidence adduced your verdict will carry the extreme penalty. Gentlemen, do not for one moment think that you pass sentence on Willard Phillips. Do not for one moment think that you pass judgment on Willard Phillips. When this defendant held the flaming candle of light and of life, of the life of Sunday Graham in his hands, he and he alone in that car, when he alone held that candle of life and
1187 blew out its light, he died too. He passed judgment on himself. He by his acts passed his own sentence.

Gentlemen, in due justice to this defendant and in due justice to the People of the State of New York and in all good conscience I stand before you this morning and say there is only one justifiable verdict in this case, and that is guilty of murder in the first degree. I thank you.

The Court: Gentlemen of the jury, we will recess until 2 o'clock, at which time I will deliver the charge to you, the jury.

1188 You are not to discuss this case amongst yourselves nor will you formulate or express any opinion with respect to this case during your lunch hour or at any time until you finally deliberate in the jury room after my charge.

All right, 2 o'clock.

(A recess was thereupon taken for luncheon.)

The Court's Charge

The Court: Gentlemen of the jury, we now come to that portion of the case where I as the Judge will give you the law which you must apply to the facts as you yourselves shall determine them to be. In the trial of every law case there are two classes of questions presented. There 1190
are questions of law and questions of fact. The Judge is charged with the responsibility of deciding all questions of law, and you, the jury, with the responsibility of deciding all questions of fact.

In reaching a conclusion it is necessary that the body which pronounces the determination should not only know what the facts are on which they have to base a conclusion, but they should know what the rules of law are. Therefore, it is my duty now to state to you the rules of law that you should take into consideration and apply to the facts as you find them, in reaching your ver- 1191
dict.

There are certain rules of law which you must consider in your deliberations and which you must always have in mind. Let me call your attention to the presumption of innocence, which survives the swearing of the information, survives the indictment and the impaneling of a jury, and continues throughout the trial and until the rendition of a verdict. The defendant sits here clothed with the presumption of innocence and thus is not required to prove his innocence, but he walks into this court an innocent man and must

be proven guilty beyond a reasonable doubt before he is guilty.

As I said before, it is the duty of the prosecution, personified here by Mr. Cahn, to prove their case beyond a reasonable doubt, and in determining the question of guilt you must not consider the punishment, except as I shall refer to it later in my charge with respect to felony murder, for that rests with the Judge.

You will base your decision on the facts as you find them and these facts must be found only from
1193 the evidence received from the witnesses and any exhibits that may have been received in evidence. You must not decide any questions of fact upon anything outside of the evidence in the case, and you are not to decide any questions of fact upon any statement made by myself as the Judge or by the lawyers on either side, unless such statements of fact are based upon evidence which you accept as being true. Your recollection of the evidence and not the recollection of either the lawyers or myself as the Judge is to control.

The defendant is entitled to every inference in
1194 his favor which can be reasonably drawn from the evidence, and where two inferences may be drawn from the same facts, one consistent with guilt and one consistent with innocence, the defendant is entitled to the inference which is consistent with his innocence.

Now, I have said that the elements of this crime with which the defendant is charged must be proven beyond a reasonable doubt. What is a reasonable doubt? A reasonable doubt has been defined as a doubt that is not a mere whim, guess or surmise, nor is it a mere subterfuge to which

you resort or maybe use in order to avoid a disagreeable duty, but it is such a doubt as a reasonable man may entertain after a faithful and honest review and consideration of the evidence. It must be founded in reason and must survive the test of reasoning. It is such a doubt as a reasonable man may entertain after a fair review and consideration of the evidence. If upon a consideration of the evidence in the case with such presumptions and inferences as fairminded men have a right to draw from the facts which have been established the juror has such a conviction of the 1196
defendant's guilt that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to himself, you may safely say then that the case is established beyond a reasonable doubt.

The credibility of each and every witness must be determined and judged by the jury, and the jury shall give such weight, effect and credence to the testimony of each witness as they think it deserves. The probative value and force of all testimony must be determined by you, the jury. You have heard the witnesses in the case. It is 1197
upon such testimony and the law of the case upon which I am now instructing you that you must deliberate and pass judgment, this being solely your province as the jury.

If you believe that any witness has willfully testified falsely in any material particular, you are authorized but not bound to reject his entire testimony. You may accept that part of a witness' testimony which you believe to be true and reject that which you believe to be untrue. You may credit it in parts as true or disbelieve it in

parts as untrue. Whatever weight you attach to the testimony of a witness rests entirely with you.

The testimony of each witness must be fairly and impartially considered and tested by a discriminating judgment with a view to determining whether that witness had a motive or an interest other than to speak the truth. It is also within your power to attach to the testimony of any witness, including the expert witnesses and the defendant who took the stand as a witness, whatever value you think it is entitled to, and you
1199 may draw upon your own experience and knowledge of human nature and affairs in estimating the value of the witness' testimony.

There has been some evidence as to the past criminal record and wrongful acts of the defendant. Such acts and criminal record must not be considered by you in any way as affirmative evidence of the charges upon which the defendant is on trial. Such evidence of the past criminal record or past wrongful acts is only allowable on the question of the credence or believability of the defendant as a witness on the witness stand. In
1200 other words, this type of cross-examination is used solely to attack the credence and believability of a witness.

In judging the quality of testimony you may take into consideration the demeanor, manner and bearing of the witness, his attitude, whether neutral, friendly or hostile towards the prosecution or the defense, and his capacity or opportunity for knowledge or observation of the events or occurrences concerning which he or she has testified. All of the testimony of these witnesses is before you. Where you find conflicts in the testimony of any of these witnesses with that of any

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other witness or witnesses, those conflicts are issues of fact for you to determine according to the rules of law which I am now presenting to you.

The specific crime charged is set forth in the indictment, which reads as follows:

"The People of the State of New York against Willard H. Phillips.

"The Grand Jury of the County of Nassau by this indictment accuse the defendant of the crime of murder in the first degree, committed as follows:

1202

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, willfully and feloniously, while engaged in the commission of a felony, to wit, the crime and felony of rape in the first degree, killed one Sunday Graham by causing her to suffocate and by choking her with a belt.

"The second count: And the Grand Jury aforesaid by this indictment accuse the defendant of the crime of murder in the first degree, committed as follows:

1203

"The defendant, Willard H. Phillips, on or about the 12th day of May, 1958, in the County of Nassau, State of New York, willfully and feloniously and of malice aforethought, killed one Sunday Graham by causing her to suffocate and by choking her with a belt.

"Dated June 3, 1958; Frank A. Gullota, District Attorney."

You should direct your attention solely and exclusively to the acts charged in the indictment, and in order for the People of the State of New York to prevail each and every element of the crime with which the defendant is being charged

must be established beyond a reasonable doubt. This indictment does not constitute any proof, nor does it raise any presumption as to the defendant's guilt. It is merely a process by which the defendant was brought into this court and a formal accusation made against him. And he then, having been asked to plead guilty or not guilty, pleaded not guilty, and this case has gone to trial before you.

You will first concern yourselves with the determination of whether the deceased Sunday
1205 Graham had been killed, and then whether the defendant Willard H. Phillips did the killing. Each of these questions posed must be established by independent proof. The question of whether or not the deceased had been killed must be established by direct proof under our law, and the question as to whether the defendant committed the homicide must be established beyond a reasonable doubt.

Dr. Joseph Foehr, called as a witness on behalf of the People, testified that he was a doctor by profession and that on May 13, 1958 he was called
1206 by the Police Department to Commercial Avenue, Garden City, where he saw a young girl lying out behind one of the warehouses. The doctor pronounced her dead. This girl pronounced dead by Dr. Foehr was later identified by an uncle of the deceased, Frank Graham, as Sunday Graham.

Dr. Lukash, the Medical Examiner of Nassau County, likewise saw the deceased behind the warehouse on Commercial Avenue with a belt around her neck and a cloth stuffed into her mouth. He performed the autopsy and in his opinion the cause of death was asphyxiation due to smother-

ing, due to the presence of the pants in the mouth of the deceased which closed the airway, causing asphyxiation.

And so we have direct proof submitted by the People with respect to the killing of the said Sunday Graham.

Now, in every case there are two kinds of evidence, direct and circumstantial. Direct evidence is when a witness testifies as to what he saw, what he heard and what he observed. Circumstantial evidence is facts or circumstances from which may be inferred or contended the guilt of the defendant. 1208

Now, in certain cases there is no testimony by eyewitnesses to the actual event, to the actual killing, nor an admission by the accused, and the People in such cases seek to establish the crime solely by circumstantial evidence.

However, in this case at bar, although there are no actual eyewitnesses to the alleged crime, there are alleged admissions by the accused which I will refer to in short order.

In determining a question of fact from circumstantial evidence there are two general rules to be observed: one, the hypothesis of guilt of the 1209 accused should flow naturally from the facts proved and be consistent with them all. Two, the evidence must be such as to exclude to a moral certainty every other hypothesis but that of the defendant's guilt of the offense imputed to him. Or, in other words, the facts must all be consistent with and point not only to his guilt, but they must be inconsistent with his innocence, and to justify a conviction for a crime upon circumstantial evidence there must be positive proof of the facts from which an inference of guilt is to be drawn, and that inference must be shown to be the only

one that could reasonably be drawn from the facts. Yet where the evidence taken together leads irresistibly and exclusively to a conclusion of guilt with which no material fact to establish it is at variance, it constitutes a higher form of evidence and may not be disregarded by the Court or the jury.

Now, you may be reluctant to conclude upon the issue of guilt in criminal cases upon evidence which is not direct, and yet if the facts brought out when taken together all point in one direction of
1211 guilt, and to the exclusion of every other hypothesis, there is no substantial reason for that reluctance. Purely circumstantial evidence in some instances may be found more satisfactory and a safer form of evidence, for it must rest upon facts which prove the truth of the charge made and which must collectively and taken together tend to establish the guilt of the accused. For instance, if any of the material facts of the case are at variance with the probability of guilt it is your duty to give the defendant the benefit of the doubt raised. Even with respect to direct evidence
1212 of eyewitnesses who seek to prove the facts of an occurrence, even then we are not guaranteed against mistake or falsehood or the distortion of truth by exaggeration or prejudice. But when we deal with a number of established facts, if upon arranging, examining and weighing them in our mind we reach only a conclusion of guilt, the judgment rests upon pillars as substantial and sound as though resting upon the testimony of eyewitnesses.

The necessity of resorting to circumstantial evidence in criminal cases becomes quite apparent, for criminal acts usually are sought to be per-

formed in secrecy and the intending wrongdoer usually chooses his time and the occasion most favorable to concealment and seeks to render detection impossible. If circumstantial evidence is to be given any legal effect the facts from which the inference of guilt is drawn must themselves be proved and not assumed. You cannot infer or guess or speculate as to any facts from which you seek to draw the inference of guilt, but from these facts as established the controlling inference must be clear and strong, pointing logically to the defendant's guilt and excluding to a moral cer- 1214
tainty every other reasonable hypothesis. The inference of guilt cannot be based upon guesswork or speculation, but must follow logically from the proven, established facts and circumstances.

Perhaps it might be in order to give you a simple illustration illustrative of the law pertaining to circumstantial evidence. Let us suppose that you went to bed one warm June evening. The weather was clear, the streets and road were dry. You woke up in the morning and you noticed that the streets and driveway were wet and there were puddles of water around. The facts established 1215
by direct evidence to your satisfaction were, one, it was not raining when you went to bed; two, when you woke up the streets were wet and there were puddles of water. Thus you can infer from these two facts that it rained during the night, and although you did not see or hear the rain, nevertheless the reasonable hypothesis or inference that flows from these two established facts is that it rained during the night, excluding to a moral certainty every other inference or hypothesis.

Now, let us change the illustration: You went to bed the same evening, the weather was dry, you woke up in the morning and only had a view of your driveway. Your driveway was wet and there were puddles of water in the middle. But right alongside your driveway was your neighbor watering his lawn. Now, from these established facts two inferences may be drawn: one, that it was raining during the night; and, two, that your neighbor wet your driveway with his hose. And under the law where there are two inferences to
1217 be drawn the one consistent with the defendant's innocence must be taken.

It might be well at this time to discuss the law on motive. Evidence was presented in this case through the testimony of Mrs. Graham with respect to certain threats or promises of ill action on the part of the defendant. It is well, therefore, that you should know what is meant by motive.

Motive is that which stimulates or incites to action. Motive is some cause or reason which moves the will and induces action; that which in-
1218 duces, tempts or leads a man to indulge in a criminal act. In criminal cases motive often plays an important part, because an act is usually accompanied by some reason for doing it. Therefore in such cases the presence or absence of motive ofttimes becomes important upon the question of intention or lack of intention on the part of the defendant.

It is not necessary that the People prove motive in order to warrant a conviction; nevertheless, although not a required element of the crime, its presence or its absence may be a matter of importance in bearing upon the question of intent, because, as I will tell you, the intent to kill is a

necessary ingredient or element in the crime of murder in the first and second degrees as set forth in the second count of the indictment. Therefore, while proof of motive is not indispensable in determining the guilt or innocence of the defendant, it should be considered by you. Of course, if the evidence points unmistakably to the guilt of the defendant the question of motive is comparatively unimportant.

Now, let us review some of the testimony that was adduced at the trial. You will recall the testimony of Sunday's mother, Mrs. Graham, who 1220 testified that Sunday was born May 25, 1949; that she was a student at Our Lady of Loretto School. She described the clothes the deceased was wearing on the day of her death, the jumper and the like.

Rita Ruskay, a witness for the People, testified that she saw the deceased on the 12th day of May in school; that the deceased ate lunch at about 11:50; and that she last saw Sunday leaving school at about 2:50 in the afternoon.

And then a young girl, Kathleen Mullen, testified that she saw Sunday as a friend and that on 1221 May 12th she saw Sunday walking on Greenwich Street, Hempstead, between Cruikshank Avenue and the Milkmaid, next to the Paraglide Inn parking lot. That she saw Sunday get into a black car which had whitewall tires. A man was in the car, a colored man, who had on a tan jacket and a white hat. And she stated when shown a photo of the car and the cap and the jacket that they looked like the articles she had seen.

Detective Rofheart subsequently testified that the cap and jacket identified by Kathleen Mullen were found in a closet of the defendant.

You will recall the testimony of Dr. Lukash, the Medical Examiner of Nassau County, who described the condition of the body of the deceased, with a belt around her neck, clothing stuffed into her mouth which was determined to be her underpants, and that the pants were stuffed completely into her mouth, only a small portion, actually less than ten per cent, being outside, and that the undergarment was impacted deep into the mouth, extending deep into the throat, distending the mouth and pharynx. That he performed an au-
1223 topsy and that he found the belt loosely around the neck of the deceased. That there were hemorhages of the chest and abdominal cavity, indicating asphyxiation. That he found the presence of some peanut shells in the hair of the deceased. An examination of the thighs of the deceased showed the blood around the vulva in the vicinity of the vagina, and that the hymen was torn and the upper portion of the vaginal tract likewise was torn and lacerated. That an examination of the vagina indicated the presence of sperm or the male discharge. In his opinion the cause of
1224 death was due to asphyxiation due to smothering caused by the presence of the pair of pants in the throat, which closed the airway of the deceased. That the mark caused by the belt was superficial and that in his opinion it had been applied after death or during the time of dying and did not contribute to the death of the deceased.

Dr. Lukash further testified that when he washed the penis of the defendant and examined it for sperm at about 7 or 8 o'clock on May 13th he found no sperm present.

You will recall the testimony of Lieutenant Lynch, who testified as a fingerprint expert. He

found prints of Sunday Graham on the window of the automobile in question, as well as a fingerprint of the defendant on the interior of the car. In this connection, with respect to the presence of the fingerprints, you will recall that Mrs. Graham testified that on several occasions prior to May 12th she had ridden in the defendant's automobile with Sunday.

Inspector Pribyl was called as a witness on behalf of the People and testified that he was connected with the Technical Research Bureau of the Police Department; that on May 12th he went 1226
to Commercial Avenue, Garden City, and saw the deceased there. That he found some blood under her buttocks and that a sample of such blood was determined to be human blood, group B, subgroup MN, the blood type of Sunday Graham. That the scrapings of the defendant's fingernails were negative and an examination of the penis washing of the defendant was negative for spermatozoa. That an examination of the undershorts and T-shirt taken from the defendant's room and examined for blood and seminal staining showed the presence of bloodstains, but he was unable to 1227
determine whether it was human blood or not.

That a smear from the vagina of the deceased indicated the presence of spermatozoa; that the hair taken from the right leg of the deceased and the hairs taken from the panties were determined to be pubic hairs of the negro race. That he examined the black 1955 Plymouth Belvedere sedan and peanut shells and hulls were found on the rear seat of the sedan. That a strand of hair was taken from the center door frame of the automobile and it was found to be a scalp hair, curly, characteristic of the negro race, similar in all

respects to the hair taken from the deceased. And, further, that Sunday Graham had no pubic hair. That there was no evidence of seminal stains on the child's clothing.

Now, in addition to the evidence which might be considered circumstantial in nature, which I have just alluded to, there were put in evidence alleged statements of the defendant. In considering a confession as evidence against the defendant you must bear in mind the provision of law which says that the confession of a defendant is not
1229 sufficient to warrant his conviction without additional proof that the crime charged has been committed. This does not mean that the confession itself must be corroborated, but it does mean that you cannot base a verdict of guilty on a confession alone. The only proof in addition to the confession necessary to justify a jury in convicting a defendant who has confessed his guilt is that there shall be proof that the crime charged has been committed, which means that there shall be direct and independent proof of what in law is called the corpus delicti. That is the fact that
1230 Sunday Graham was killed.

So, if you are satisfied beyond a reasonable doubt by direct and independent evidence other than that of the defendant's confession that Sunday Graham was in fact killed, then the confession by the defendant that he committed that murder, if you are satisfied of its truth beyond a reasonable doubt, would justify you in returning a verdict of guilty of murder in the first degree.

As to a confession obtained while a defendant is in custody of the police, it is my duty to charge you that any unnecessary delay in arraigning is

forbidden by law and should be considered by the jury. The question of unnecessary delay is one for you to decide, keeping in mind the practical aspects involved in every criminal case. It is no ground for exclusion of a confession that it was made by a prisoner before or while under arrest, or to the officer in whose custody he was, nor is failure to warn the accused that he is under no obligation to make any statement, and that anything he says may be used against him, any ground for excluding his confession. It is when a 1232
defendant is taken before a Magistrate for a judicial hearing that he must be advised of his statutory rights. The grounds on which confessions made by a party accused under promises of favor or threats of injury are excluded as incompetent, or in case any wrong is done to the accused in giving them. The accused may be induced by pressure of hope or fear to admit facts not favorable to him without regard to their truth in order to obtain the promised relief or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted. 1233

The first statement given by the defendant referred to was taken by Detective Rofheart and was put in evidence as Exhibit 14. Subsequently a question and answer statement was put in evidence, which question and answer statement was taken by Mr. Birchall and was likewise read to you by Mr. Cahn. And subsequently a further statement was introduced into evidence by the People through the witness Detective Stark. These statements were all read to you.

Section 395 of the Code of Criminal Procedure provides substantially what I have just told you. While there was no evidence of violence used upon the defendant and there is no claim that he was promised immunity, yet you, the jury, must consider whether the confession has been voluntarily made; that is, not produced by fear or under such circumstances and conditions as to lead one to believe that it was not the truth. Even when a confession is admitted in evidence, even when it is conceded to have been made, yet its truth is
1235 always a question for the jury, and in determining this the jury must have all the circumstances surrounding its making. The jurors have the right plainly, as has been stated by this Court, to consider the detention of the defendant from 11 o'clock in the morning of May 13th until approximately 5 or 6 o'clock the following morning, May 14th, while confessions were taken. In this case the detention may have had no effect whatever upon the defendant and all that he said may be true, but nevertheless it is not for the Court but for the jury to say.

1236 Now, with respect to the crime with which the defendant is charged: there are four types of homicide provided for in the penal statutes of this state. There is excusable homicide, which is defined as a homicide when committed by accident and misfortune, or the result of a lawful act accomplished by lawful means with ordinary caution and without any unlawful intent. Such a homicide is excusable under our law.

Homicide is justifiable when committed in self-defense of the slayer or any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the

person slain to commit a felony or to do some great personal injury to the slayer or to any such person.

The charge against the defendant in the indictment which I have already read to you is murder in the first degree, and the defendant is charged with two types or forms of murder in the first degree. The first is known as premeditated murder, one committed from a deliberate and premeditated design to effect the death of another. The other form is known as murder in the commission of a felony, which is the killing of a 1238 human being without premeditation, deliberation or design to effect death, but while the slayer was engaged in the commission of a felony either upon or affecting the person slain.

In this case the People have adduced proof which they contend shows that the defendant is guilty of murder in the first degree in both these forms. That is, that Willard H. Phillips killed Sunday Graham by causing her to suffocate and by choking her with a belt, from a deliberate and premeditated design to effect her death; and that at the time Willard H. Phillips killed Sunday 1239 Graham he was likewise engaged in the commission of a felony upon her person; namely, rape in the first degree.

You will first concern yourselves with the first count of the indictment charging the defendant with a felony murder. That is, while engaged in the commission of the felony of rape in the first degree he killed one Sunday Graham by causing her to suffocate. If the defendant was engaged in the commission of rape and while accomplishing such act resorted to violence from which death

was not intentionally produced, he is guilty of murder in the first degree.

Now, what elements constitute the crime of rape in the first degree? A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent, when her resistance is forcibly overcome, is guilty of rape in the first degree.

To establish the crime of rape it must be proven beyond a reasonable doubt that Sunday Graham
1241 was forcibly overcome by the defendant and that he perpetrated the act of sexual intercourse with the express intent to have carnal knowledge of her. If you believe that Sunday Graham resisted the advances of the defendant Willard H. Phillips and that the defendant overcame that resistance by putting her pants in her mouth, causing her to suffocate, thus making her incapable of resisting, and under these circumstances committed the rape, even though he did not intend to take her life, and although his object and purpose was simply to accomplish his purpose of having criminal intercourse with the deceased, and he did this
1242 simply to overcome her resistance, and if that was his purpose and intent and she died while he was thus engaged in that act, it was murder in the first degree under the first count of the indictment. No intent to kill was necessary if the act causing the death was connected with and collateral to an independent violence designed. If the violence used to commit the rape results in death there is a felony murder.

Keep in mind that the term sexual intercourse in a criminal prosecution is defined as: any sexual penetration, however slight, is sufficient to com-

plete the crime. And in connection therewith you will recall the testimony of Dr. Lukash, who performed the autopsy and found blood upon the decedent, pubic hairs in her panties, a ruptured hymen, and a lacerated vagina, as well as the presence of spermatozoa in the vaginal orifice.

If, therefore, you are satisfied beyond a reasonable doubt that the defendant killed Sunday Graham while engaged in the commission of the crime of rape in the first degree, although without premeditation, deliberation or intent to kill, then you may find the defendant guilty of murder in 1244 the first degree; in which case, however, you may return a verdict in either one of two forms; namely, murder in the first degree or murder in the first degree with a recommendation of life imprisonment. It is not obligatory that you make such recommendation, but it is within your power to do so if you so determine.

Now we will consider the second count of the indictment, which accuses the defendant of murder in the first degree, in which he willfully and feloniously and of malice aforethough killed Sunday Graham by causing her to suffocate and by 1245 choking her. If you believe that the defendant stuffed the pants of the deceased into her mouth and throat with the specific design to effect death, with premeditation and deliberation, he is guilty of murder in the first degree as set forth in that second count. To constitute such crime under this count the following elements must be established by the People beyond a reasonable doubt: first, the intent to kill; and, secondly, the defendant must have acted with premeditation and deliberation in effecting the death.

1246 *The Court's Charge*

With respect to the intent to kill, the law presumes that a person intends the natural consequences of his act. The intent, if any, is the secret and silent operation of the mind and its only visible physical manifestation is in the accomplishment of the thing planned. You must find not only that the defendant intended to kill Sunday Graham, but that such intent was formed from a deliberate and premeditated design to effect death. This design to kill must precede the killing by an appreciable space of time, however
1247 short it may be. It must be sufficient for some reflection or consideration to make a choice to kill or not to kill and to form a definite purpose to kill. There must be sufficient time for the mind to pause, ponder and determine as to what course should be taken, that of killing or that of not killing. Whether a deliberate and premeditated design was formed before the killing must be determined upon all the evidence in the case.

Only yesterday you heard two psychiatrists testify with respect to the defendant's capacity, and their respective testimony is fresh in your
1248 mind so as not to necessitate my reviewing the same.

If there was no reflection or consideration or definite purpose to kill it would not be premeditated or deliberate murder, or murder in the first degree under the second count. If, however, you find that the defendant inflicted the injuries in a sudden transport of passion, excited to the extent of disturbing his reason and his faculties and depriving the defendant of capacity to reflect while under the influence of some sudden and uncontrolled emotion excited and brought on by the

turn of events, then it might be that any one or all of the required elements of intent, premeditation and deliberation may not be present. 1249

If you are convinced beyond a reasonable doubt in this case that the defendant choked and killed with deliberation, premeditation, and intent to kill, then your verdict would be guilty of murder in the first degree without any recommendation. It is only in case you are not so convinced that you should consider whether the defendant killed Sunday Graham without deliberation, premeditation or intent to kill, but while engaged in the commission of a felony, rape, as set forth in the first count. 1250

Let me repeat, gentlemen, that a recommendation of life imprisonment may be made only if you find the defendant guilty of murder in the first degree committed during the commission of a felony. That is by killing without design to effect death, but while engaged in the crime of rape as set forth in the first count charging the defendant with felony murder. This recommendation, if decided upon by you, must be a part of your verdict. If, on the other hand, you find that the killing was with deliberation, premeditation and intent to kill, then your verdict must be guilty of murder in the first degree without recommendation of life imprisonment. The choice of whether recommendation should or should not be made a part of the verdict is left to the jury, and the verdict is incomplete until all of you have agreed. Under this section the jury must determine whether the accused is guilty of the murder charged and whether sentence shall be death or whether the trial Judge may pronounce a sentence of life imprisonment, and both matters must 1251

be determined by the jury and the jury's decision on both matters must be embodied in the verdict.

If you should entertain a reasonable doubt after a faithful and honest review of all the evidence as to whether the defendant was guilty of murder in the first degree in either of the two forms I have referred to, it does not follow that you should render a verdict of acquittal. You should then proceed to determine whether the defendant was guilty of some other form of homicide. It is our law that a person charged with a crime may be
1253 convicted of the crime charged in the indictment or of a lesser degree of that crime when the facts warrant it. When it appears that the defendant has committed a crime and there is reasonable ground for doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of those degrees only. Therefore, after an honest and faithful review of the evidence, if you have a reasonable doubt of the defendant's guilt of murder in the first degree you will then and only then consider the question of the defendant's guilt of murder in the second degree, which is the
1254 killing of a human being with a design to effect death, that is, with intent to kill, but without deliberation and premeditation.

You will note the distinction between the two degrees of homicide I have mentioned thus far. In murder in the first degree under the second count of the indictment deliberation and premeditation as well as intent to kill must be found to exist. But to constitute murder in the second degree it is sufficient if intent to kill is found to have existed, although there was no premeditation or deliberation. If you are satisfied in your consideration of the second count of the indict-

ment that the killing of Sunday Graham was committed with a design to effect her death but without premeditation or deliberation, and, further, that the People have not established the elements of murder in the first degree under the theory of the first count, that is, felony murder, you may consider the crime of manslaughter in its two degrees.

Homicide is manslaughter in the first degree when committed without a design to effect death by a person engaged in committing or attempting to commit a misdemeanor affecting the person or 1256
property of the person killed or of another, or in the heat of passion but in a cruel and inhuman manner or by means of a dangerous weapon. Neither premeditation nor deliberation nor intent to kill are necessary elements to establish or constitute the crime of manslaughter in the first degree. If, therefore, you are satisfied in this case by the evidence beyond a reasonable doubt that the killing occurred under the circumstances I have just stated, but without premeditation or deliberation or intent to kill, then your verdict should be guilty of manslaughter in the 1257
first degree.

If you are not so satisfied you will then consider the crime of manslaughter in the second degree, which is homicide committed without a design to effect death, first by a person committing or attempting to commit a trespass or any invasion of the private rights of the person killed or of another; second, in the heat of passion but not by a dangerous weapon or by the use of means either cruel or unusual, or by any act, procurement or culpable negligence not constituting the

crime of murder in the first or second degrees or manslaughter in the first degree. If you should be satisfied beyond a reasonable doubt by the evidence that the killing of Sunday Graham occurred under those circumstances your verdict would be guilty of manslaughter in the second degree.

Although no plea of insanity was interposed in this case, nevertheless I deem it my duty to present to you the law of this state in this respect. Every man is presumed to be sane and possessed of a sufficient degree of reason to be responsible
1259 for his crimes until the contrary is shown. In this state the test of whether or not a man is insane so as to absolve him of responsibility for his crime has been fixed by statute. The use of the words "insanity" and "sane," however, does not relate to what may be called insanity in the medical profession or in the view of those experienced in diseases of the mind and in defects of reason.

Our law defines the test quite clearly, and that portion with which we are now concerned reads as follows: A person is not excused from criminal
1260 liability as an idiot, imbecile, lunatic or insane person except upon proof that at the time of committing such criminal act he was laboring under such a defect of reason as, one, not to know the nature and quality of the act he was doing; or, two, not to know that the act was wrong. The two questions that you are normally asked to decide are, one, was the defendant Phillips laboring under such a defect of reason that he did not know the nature and quality of his act; and, two, if he did know the nature and quality of his act did he know the act was wrong? And in this con-

nection the testimony of both experts, psychiatrists, was to the effect that the defendant was not laboring under such a defect of reason and that he did know the difference between right and wrong.

Summarizing, members of the jury, you will first determine whether the deceased Sunday Graham was killed. Then you will determine and deliberate whether the killing of Sunday Graham was accomplished by the defendant and was not excusable or justifiable. If you are satisfied from the evidence that the defendant caused Sunday 1262
Graham to suffiocate by choking her from a deliberate and premeditated design to effect her death, your verdict should be guilty of murder in the first degree.

If you are not so satisfied beyond a reasonable doubt, but are nevertheless satisfied that Willard H. Phillips choked and killed Sunday Graham without such design but while engaged in the felony of rape in the first degree, your verdict should be either guilty of murder in the first degree or guilty of murder in the first degree with a recommendation of life imprisonment. 1263

If not so satisfied beyond a reasonable doubt with respect to the commission of a felony murder, but you are nevertheless satisfied that the defendant killed Sunday Graham without premeditation or deliberation and not while engaged in the commission of a felony, but with intent to kill, your verdict should be guilty of murder in the second degree.

If not so satisfied beyond a reasonable doubt, but you are nevertheless satisfied that Willard H. Phillips choked Sunday Graham to death while

committing or attempting to commit a misdemeanor, or in the heat of passion or by means of a dangerous weapon, your verdict should be guilty of manslaughter in the first degree.

If not so satisfied, but you are nevertheless satisfied that Sunday Graham was killed by the defendant while engaged in the invasion of a private right, or in the heat of passion but not by means of cruel or unusual conduct or by means of a dangerous weapon, or by any act, procurement or culpable negligence, your verdict should
1265 be guilty of manslaughter in the second degree.

And, finally, if not satisfied of his guilt of murder or manslaughter in any of the degrees, your verdict should be not guilty.

The law makes no provision for a recommendation of clemency except as I have above set forth, should you determine upon any one of the above possible verdicts except with respect to the first count of the indictment commonly referred to as a felony murder. And, gentlemen, your verdict must be unanimous. All of you must concur in a complete verdict.

1266 Now, in conclusion may I say again that your recollection of the testimony in this case is controlling. You are the sole judges of the facts. This Court is absolutely impartial in this prosecution, and if it has given any impression of partiality in any way as to the guilt or innocence of this defendant, I request you and it is your duty to disregard the same in your consideration of the case. Decide this case without sympathy or prejudice, with an open mind based upon your background of experience and good common sense. The fact that one side or the other objected to

a particular question should not and may not be made the basis of any inference for or against that persons's side. Under the law each side has a perfect right to object to any question asked any witness or to any other evidence offered. Whether the Judge decides that the question or evidence is proper or improper does not concern the jury, because that is a question of law solely for the Judge to decide. When testimony is stricken out by the Judge the jury should ignore such testimony as if you had never heard it uttered. 1268

Now, I have referred to various exhibits and testimony in this case and I have told you the claims and contentions either singly or in comparison with each other or with one another, and you must understand that these all present questions of fact for you. The mere fact that the Court says one side or the other claims or contends a thing does not make it so. You must pass upon that contention and determine whether it is supported or not by the evidence in the case. They are all questions of fact for you to pass upon. As the exclusive judges of all the questions of fact in determining the guilt or innocence of this defendant you must consider all the evidence, not alone so much of the evidence as I have alluded to, if you find it to be so. Consider just what is in the record and take everything into account. Approach this supremely important object of the case, to do justice between the parties, keeping in mind the rights of the People and the defendant and the preservation of law and order. 1269

1270 Are there any exceptions or requests?

Mr. Goodman: If your Honor please, the defense acknowledges that the Court has thoroughly and well instructed the jury that it is their recollection of the facts and not that of your Honor of counsel which controls.

However, I respectfully submit that where your Honor may have fallen into error of omission and interpretation of some of the evidence in your summary that could constitute grave prejudicial error to the defendant, and it is in that
1271 spirit that I respectfully request your Honor to direct the jury to take into consideration relative to Detective Rofheart's testimony that the items of clothing which he found; namely, the hat and the jacket, were not identified by Kathy Mullen but were merely pointed out by her as looking like the items worn by the defendant.

The Court: I believe I said that.

Mr. Goodman: No, my recollection, if your Honor please, is that in referring to Detective Rofheart's testimony you said he found the items identified by the child, and I submit that that was
1272 erroneous.

The Court: All right.

Mr. Goodman: I would respectfully request that your Honor instruct the jury when considering the testimony of all witnesses and particularly that of Kathleen Mullen, that they consider all of the surrounding facts in determining the accuracy of the testimony; and with specific respect to Kathleen Mullen I would ask that the jury be instructed to take into consideration the distance she was from the car which she observed, and the fact that she was operating a bicycle over rough terrain at the time.

Mr. Cahn: I don't object to counsel offering suggestions as to charges as to the law, but I do object to a second summation.

The Court: He is asking me to call that to the attention of the jury. Go ahead.

Mr. Goodman: May the record indicate whether or not your Honor granted my request?

The Court: I grant the request.

Mr. Goodman: I respectfully request your Honor to instruct the jury in repeating in their collective minds the testimony of Dr. Lukash that he found the belt around the child's neck to be 1274 loose.

The Court: Mr. Goodman, I believe I alluded to the evidence. I think if you are going to have any exceptions or requests they should be based on the law.

Mr. Goodman: Well, this is in the same spirit as brought out as to my purpose for those other requests, if your Honor please.

The Court: All right, go ahead.

Mr. Goodman: Do I understand the request is granted?

The Court: I will permit it. I believe I did 1275 say that.

Mr. Goodman: I further respectfully request that the jury be instructed to take into consideration when considering the testimony of Inspector Pribyl an important element which was omitted from your Honor's summary; namely, that his inspection of the automobile failed completely to reveal the existence of any blood or seminal stain.

Mr. Cahn: May I object at this time once again, your Honor, and state that your Honor has already instructed this jury that they are to

1276 take into consideration all of the evidence, no matter whether you commented on it or not?

The Court: I specifically said at the end that if I did not comment on it they should take into consideration all of the evidence, and if they think of anything that I didn't say they are to consider it.

Mr. Cahn: This is on questions of law purely, your Honor. Counsel is taking this opportunity to go over questions of fact, which is not proper at this time. Your request was for charges on
1277 the law. May they take this into consideration or may they take that into consideration is a question of fact which you have already told this jury that they may or may not do, and it is their recollection which counts.

The Court: He is right, Mr. Goodman. I will direct that what you have just said to the jury—I will so instruct the jury. But restrict yourself.

Mr. Goodman: I have no further requests along those lines, if your Honor please.

I now respectfully request your Honor to charge the jury that the jury must find that any confes-
1278 sion introduced in this case was freely and voluntarily given, beyond a reasonable doubt.

The Court: I so charge.

Mr. Goodman: I further respectfully request your Honor to charge the jury that an involuntary confession is evidence of nothing.

The Court: I so charge.

Mr. Goodman: I respectfully request your Honor to charge in considering whether or not the confessions were freely and voluntarily given the following items are to be taken together in composite: evidence of delay in arraignment of the defendant, evidence of duress, evidence of

coercion, evidence of duration of the questioning, evidence of lack of sleep, evidence of lack of food, evidence of failure to arraign within a reasonable time, evidence of failure to warn the defendant that he had no duty to speak and that anything he might say would be held against him, and, further, whether or not his confession was for the express and specific purpose of extracting from him an involuntary confession.

The Court: An involuntary—

Mr. Goodman: A confession.

The Court: Are you using the word "involuntary"? 1280

Mr. Goodman: I withdraw the word "involuntary."

The Court: If you withdraw that last statement I will go along with you. Starting with "and further."

Mr. Goodman: I will have to ask the stenographer to read that back.

The Court: No, I am not going to have it read back. All those elements that you have recited to the jury in connection with having no food and water and whatever it was, I so charge 1281 the jury, but not that portion of your request which says that the express purpose of holding him there was for the purpose of a confession. I refuse to charge that last part.

Mr. Goodman: If I were to give your Honor authority from the Court of Appeals on that point would your Honor reconsider the ruling on my request?

The Court: I have charged.

Mr. Goodman: I respectfully except, if your Honor please.

I further respectfully request your Honor to charge that the jury must unanimously return with a verdict, if they do, upon the felony murder of guilty with a recommendation or guilty without a recommendation.

The Court: I so charge.

Mr. Goodman: The defense has no further requests or exceptions.

The Court: The two alternate jurors will please step down.

1283 Mr. Cahn: May I make one statement? To clear the record may I request your Honor to charge that the jury may take into consideration the length of time and the express purposes of the Police Department in keeping the defendant, as to whether or not the confession was voluntary or involuntary.

The Court: I will so charge, but that is not what he asked. That I will charge the jury.

All right, gentlemen, you will now retire to deliberate in the jury room and when you have reached a verdict you will so notify the Court.

1284 (The jury retired at 3:42 P. M.)

The Court: I think we will release the two alternates at this time.

Mr. Goodman: It does pose a problem, if your Honor please. There is really still a possibility if not probability of one of the jurors becoming ill during deliberations, and I don't think either Mr. Cahn or I want a retrial.

The Court: All right, put these two alternates in another jury room.

Mr. Goodman: The defense trusts the alternates understand the necessity for the request.

The Court: Yes, all right.

1285

(The two alternate jurors retired from the courtroom.)

The Court: I now request the defendant and ask this question, whether if a request is made for the exhibits to be submitted to the jury in the jury room, whether he will consent to send those exhibits up to the jury room.

Mr. Goodman: The defendant will not consent to the exhibits being given to the jury.

(The jury returned to the courtroom at 8:43 P. M.)

1286

(The two alternate jurors were present.)

The Court: I have a request or note from the Foreman of the jury which reads as follows: The jury wants felony murder defined.

In concerning yourselves with the first count of the indictment charging the defendant with a felony murder, that is while engaged in the commission of the felony of rape in the first degree he killed one Sunday Graham by causing her to suffocate, if the defendant was engaged in the commission of rape and while accomplishing such act resorts to violence from which death is not intentionally produced, he is guilty of murder in the first degree.

1287

Now, what elements constitute the crime of rape in the first degree? A person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent, when her resistance is forcibly overcome, is guiltv of rape in the first degree. To establish the crime of rape there must be proven beyond a reasonable doubt that Sunday Graham was forcibly overcome by the defendant and that he perpetrated the act of sexual intercourse with the express intent to have carnal knowledge of her.

1288 *Verdict*

If you believe that Sunday Graham resisted the advances of the defendant, Willard H. Phillips, and that the defendant overcame that resistance by putting her pants in her mouth, causing her to suffocate, thus making her incapable of resistance, and under these circumstances committed a rape, even though he did not intend to take her life, and although his object and purpose was simply to accomplish his purpose of having criminal intercourse with the deceased, and he did this
1289 simply to overcome her resistance, and if that was his purpose and intent, and she died while he was thus engaged in that act, it was murder in the first degree under the first count of the indictment, a felony murder count.

No intent to kill was necessary if the act causing the death was connected with and collateral to an independent violence design. If the violence used to commit the rape results in death there is a felony murder.

Is that sufficient?

The Foreman of the Jury: Thank you, sir.

1290 (The jury again retired at 8:46 P. M. and returned at 9:02 P. M.)

(Roll call of Jurors.)

The Clerk: Gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: Mr. Foreman, what is the jury's verdict?

The Foreman: We find the defendant Phillips guilty as prescribed in the first count of the indictment, without recommendation.

The Clerk: Harken to your verdict as the Court has it recorded: you say you find the de-

fendant guilty of murder in the first degree, first count of the indictment, without a recommendation. That is your verdict, so say you all?

The Jurors: Yes, sir.

Mr. Benoit: If your Honor please, the defense requests at this time that the jury be polled.

The Court. Very well.

(The jurors were individually polled and asked if that was their verdict and each answered in the affirmative.) 1292

The Clerk: All answer in the affirmative, Judge.

Mr. Benoit: If your Honor please, I am going to ask that the record show that the defendant has been acquitted of the premeditated and deliberate charge of murder in the first degree.

I would move at this time, your Honor, that the verdict be set aside and a new trial granted on the ground that the verdict is contrary to the law and against the weight of the evidence.

The Court: Motion denied.

(Defendant sworn and pedigree taken.) 1293

The Court: Date of sentence October 17th.

1294

Sentence

COUNTY COURT

NASSAU COUNTY—PART I

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

WILLARD H. PHILLIPS,

1295 Defendant.

———o———

Mineola, N. Y., October 17, 1958.

Before:

HON. PAUL J. WIDLITZ, *County Judge.*

Appearances:

MOXEY A. RIGBY, ESQ., Asst. Dist. Atty., for the People.

1296

MEYER F. GOODMAN, ESQ. and JOHN H. BENOIT, ESQ. for the Defendant.

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(The defendant was arraigned for sentence.)

The Clerk: You are Willard H. Phillips?

The Defendant: Yes, sir.

The Clerk: You appear with your attorneys Mr. Goodman and Mr. Benoit?

The Defendant: Yes, sir.

1297

The Clerk: Have you any legal cause to show why judgment should not be pronounced against you?

The Defendant: No.

The Court: Willard H. Phillips, you have been found guilty of the crime of Murder in the First Degree as alleged in the first count of the indictment and without a recommendation for leniency. The punishment for this crime is fixed by law and is mandatory.

It is the sentence of this Court that you, Willard H. Phillips, be committed to Sing Sing State Prison at Ossining, N. Y., there to be put to death in the manner provided by law on some day in the week beginning November 24, 1958.

1298

Mr. Goodman: If your Honor please, may the record note that the defendant respectfully excepts to the judgment of this Court upon all the grounds raised on the two motions to dismiss the indictment, and upon the appropriate grounds recited in the Code of Criminal Procedure?

The Court: All right. Motion denied.

1299

People's Exhibit 1

BIRTH CERTIFICATE

(See opposite ☛)

(1)

Commonwealth of Pennsylvania

Notification of Birth Registration

This Certifies that, A CERTIFICATE OF BIRTH HAS BEEN FILED IN THE STATE OFFICE FOR THE REGISTRATION OF VITAL STATISTICS AT HARRISBURG, PENNSYLVANIA, UNDER REGISTERED NUMBER 8985-5-49.

NAME Dorothy Mynita Graham SEX Female.

BORN ON 5-25, 1949, AT Phila delphia, Penna.

NAME OF FATHER Curtis C. Graham.

MAIDEN NAME OF MOTHER Mynita R. Mattox

Thomas E. Finegan M.D.

SECRETARY OF HEALTH

People's Exhibit 2

ADOPTION PAPERS

(See opposite ☛)

Commonwealth of Pennsylvania

In the Municipal Court
of Philadelphia

In Re:

Adoption of

REGINA ANNE SCOTT

October Term, 1950

No. 825

Be it Remembered, that I, D. BARLOW BURKE, Clerk of the Municipal Court of Philadelphia, do hereby certify, that the following is a true and correct copy of an Adoption Decree entered by the said Court in the above case, to wit:

AND Now, to wit, this Third day of October, A. D. 1951, in consideration of the petition filed in this matter and after investigation made and after testimony heard in open Court, and being fully advised in the premises.

It is therefore, upon motion of Lewis Tanner Moore Esq., ORDERED, ADJUDGED and DECREED, that from this date the said child Regina Anne Scott, also known as Regina Ann Scott,

shall, to all legal intents and purposes, be the child of the petitioners Curtis C. Graham and Mynita Graham, née Mattox, and for the purposes of inheritance and all other legal incidents and consequences, shall be the same as if she had been born of them in lawful wedlock, and shall be hereafter known by the name of DOROTHY MYNITA GRAHAM

1312

People's Exhibit 3

JUMPER

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 4

1313

BLOUSE

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 5

SWEATER

Physical Exhibit

1314

(Omitted pursuant to stipulation)

People's Exhibit 6

PANTIES

Physical Exhibit

(Omitted pursuant to stipulation)

1315

People's Exhibit 7

PURSE

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 8 1316

BELT

Physical Exhibit

(Omitted pursuant to stipulation)

1317

1318

People's Exhibit 9

Book 348 Page 365

IN THE

CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

IN AND FOR HILLSBOROUGH COUNTY, FLORIDA.

IN CHANCERY

DIVORCE No. 68397-C

1319 Filed & Docketed Apr. 26 1944

CHAS. H. PENT, Clerk

By RAYMOND VEGUE

—o—

MINNIE PHILLIPS,
Plaintiff,

VS.

WILLARD PHILLIPS,
Defendant.

—o—

1320

FINAL DECREE

This cause coming on to be heard this day upon the report of a Special Master in Chancery, heretofore appointed to take the testimony herein and report his findings, and the Court being fully advised in the premises, finds that it has jurisdiction of the parties and the subject matter herein and that the plaintff is entitled to the relief prayed for; in consideration thereof, it is therefore

ORDERED, ADJUDGED AND DECREED that the Master's recommendations be and the same are here-

by approved and confirmed in full and the plaintiff, Minnie Phillips, is hereby granted a divorce A Vinculo Matrimonii from the defendant, Willard Phillips, it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff is hereby allowed to resume the use of her maiden name of Minnie Mattox.

DONE AND ORDERED this 26th day of April, A. D. 1944.

1322

HARRY N. SANDLER
Circuit Judge

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, JAMES F. TAYLOR, JR., Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing is a true and correct copy of Final Decree as filed in this office Apr. 26, 1944 and recorded in Chancery Order Book 348 page 365 of the Public Records of Hillsborough County, Florida. 1323

Witness my hand and official seal this 19 day of September A. D. 1958.

JAMES F. TAYLOR, JR.,
Clerk

By P. J. GODIK,
D. C.

People's Exhibit 10

PHOTO OF SUNDAY GRAHAM

(See opposite ☞)

People's Exhibit 11

PHOTO OF CAR

(See opposite ☛)

1336

People's Exhibit 12

WHITE CAP

Physical Exhibit

(Omitted pursuant to stipulation)

1337

People's Exhibit 13

JACKET

Physical Exhibit

(Omitted pursuant to stipulation)

1338

1339

People's Exhibit 14

STATEMENT OF WILLARD H. PHILLIPS

May 13, 1958

My name is Willard PHILLIPS, I am 42 years of age and live at 38 Garfield Pl, Hempstead where I rent a room from Mrs WATSON the owner who lives downstairs. I live there alone and am divorced. I work as a laborer but at present I am unemployed.

Yesterday, May 12, 1958, I got up at about 6:15 1340
AM. I left the house about 7:00 A M and drove to Farmingdale in 1955 Plymouth sedan black, li-
W.H.P.
cense 8R 8292. I was looking for a place ~~on~~ that does precasting work but I could not find it. I rode around the area for about an hour and at about 9:00 AM I started back to Hempstead. I arrived in Hempstead village at about 10:00 AM and went to the Bus Terminal and used the toilet. I then went upstairs to Nedicks and had some orange juice and some coffee. Then I went over to Grants and I bought a record called All Time Favorites. I then drove home arriving about 1341
11:00 AM. I went upstairs and laid on my bed and slept until about 2:15 PM. Then I went to the drug store, the Park Lake on S. Franklin and Graham and bought a news paper. I then went to the New York State Unemployment Office on Fulton Ave Hempstead and got there about 2:45 PM. I stayed there until about a little past 3:00 PM. I then went back to S. Franklin St. and parked oppsite the Franklin Bar but down a ways
W.H.P.
and read the paper ~~look in the~~ looking for a job. I spoke to Beatrice CLEMMONS, 178 S. Franklin

1342 *People's Exhibit 14*

St. Hempstead for a few minutes and played with W.H.P.
her kids for a time and ~~about~~ 4:~~30~~ ~~or~~ between 4:30 and 5:00 PM I left for Mineola and arrived at Mr Scott 32 Third Ave, Mineola at about 5:20 PM. I filled out an application there in connection with some floor waxing work and then I left there about a little after six PM and then I took the record that I bought back to Grants and changed it for another one called a Tribute to Glenn Miller. I then went to Johnnie Mays restaurant
1343 between W.H.P.
to eat supper arriving there ~~about~~ 6:30 and 7:00 PM. While I was there I called Mrs Graham at 7:10 PM and she told me that Sunday had not come home from school yet. I then went home and put the record on the bed and went

Willard H. Phillips

Page Two

downstairs and spoke to Mrs Watson for a time. W.H.P.
~~About~~ Between 7:30 PM and 8:00 PM I left the
1344 house and to help search for Sunday. As I left the house I met Curtis Mattox, Mrs Grahams brother, and asked him if he had heard anything or seen Sunday. I then drove to Mrs Gardner at 122 Princeton St. Hempstead Heights and asked if she had seen Sunday. It was about 8:00 PM and I kept on looking for Sunday. About 8:30 or 9:00 Pm I drove to 74 Prospect St. Roosevelt and got my cousin, Alice Watkins and took her to the Grahams house on Seabury St. I then continued looking for Sunday. About 10:30 PM I came back to the Grahams to see if Alice wanted a ride home but she was not ready. I did not go into the Grahams, but Alice came out to my car. I then went home arriving about 11:00 PM. I

People's Exhibit 14 1345

went to sleep and got up this morning at about 6:15 AM. I left the house about 7:00 AM and drove to Flushing to look for another pre casting place but I did not find it. I got to Flushing about W.H.P.
8/ 8:00 AM and drove around for about a half hour and then drive back to New Hyde Park arriving there about 9:30 AM. I went to the Precast Buildings sections on Nassau Terminal Road where I used to work. I spoke to Mr Carroll for a time and told him about what I had done yesterday and where I had been this morning and 1346
that I could not find a job. I got back to my room about 11:00 AM where I stayed until the detectives came and took me to the Police Station.

I have given this two page statement to the detective who is typing it, read it, and it is the truth to the best of my knowledge.

WILLARD H. PHILLIPS
38 Garfield Place
Hempstead, N.Y.

WITNESS DETECTIVE N ROFHEART, 91 1347

People's Exhibit 15

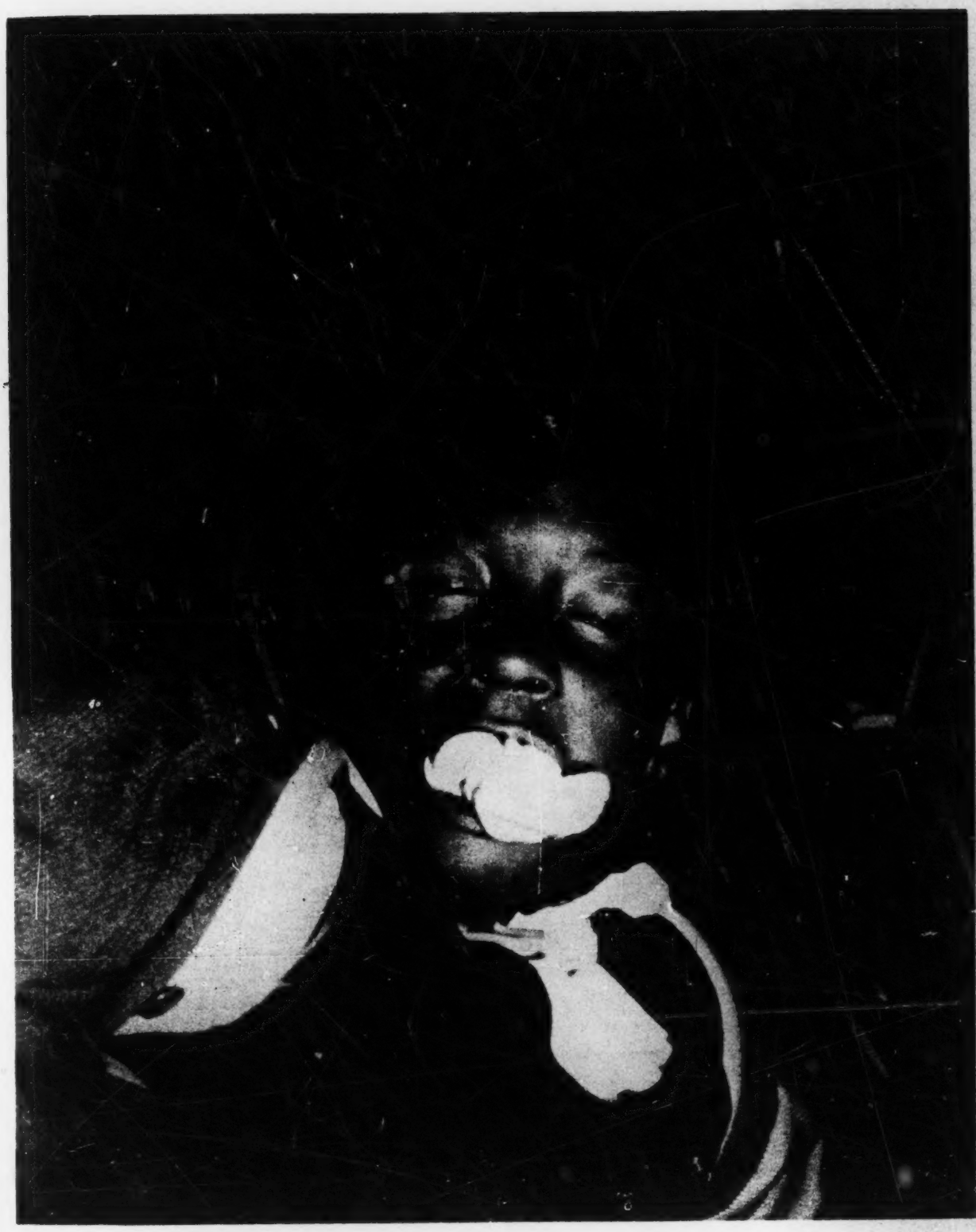
PHOTO OF BODY

(See opposite ☛)

People's Exhibit 16

PHOTO OF CLOTH IN MOUTH

(See opposite ☛)



1360

People's Exhibit 17

CAR WINDOW (VENTILATOR)

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 18

1361 PHOTO OF FINGERPRINT ON WINDOW

(Omitted pursuant to stipulation)

People's Exhibit 19

PHOTO OF FINGERPRINT OF SUNDAY GRAH

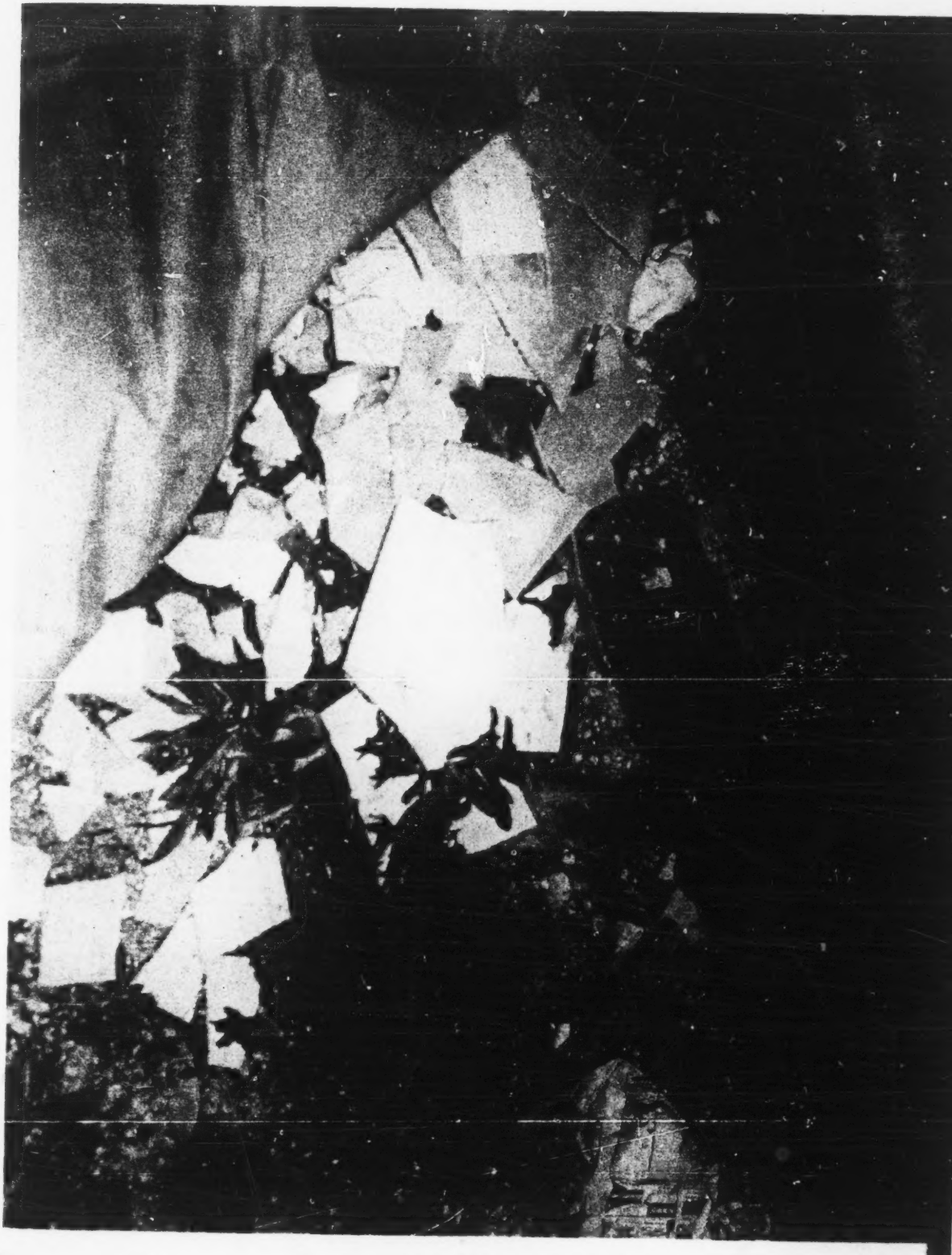
(Omitted pursuant to stipulation)

1362

People's Exhibit 20

PHOTO OF BLOOD ON SCENE

(See opposite ☛)



1366

People's Exhibit 21

SHORTS

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 22

1367 T SHIRT

Physical Exhibit

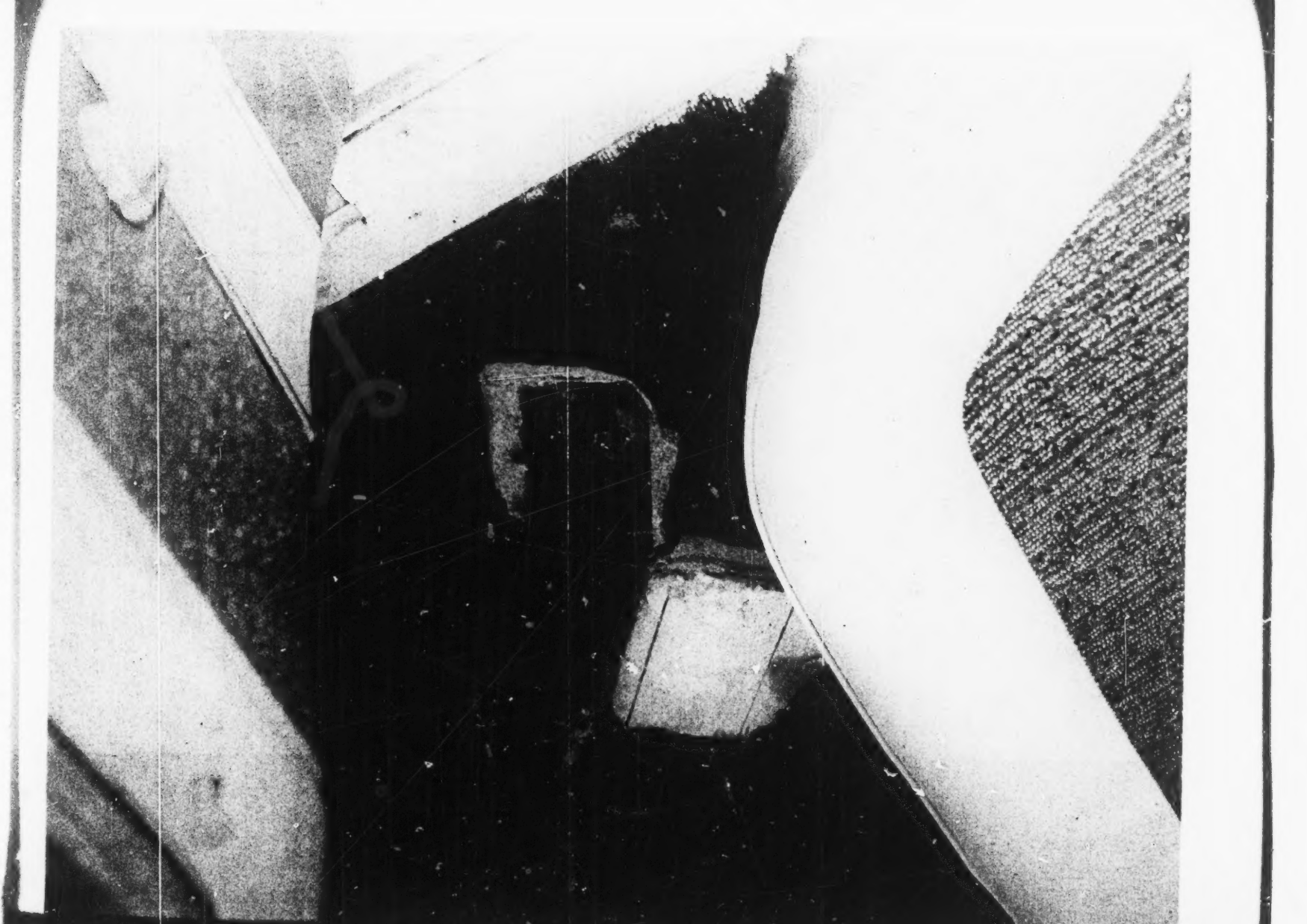
(Omitted pursuant to stipulation)

People's Exhibit 23

PHOTO (CAR FLOOR)

(See opposite ☛)

1368



People's Exhibit 24

PHOTO (INTERIOR OF CAR)

(See opposite ☛)

1378

People's Exhibit 25

PEANUT SHELLS

Physical Exhibit

(Omitted pursuant to stipulation)

People's Exhibit 26

1379 PEANUT SHELLS

Physical Exhibit

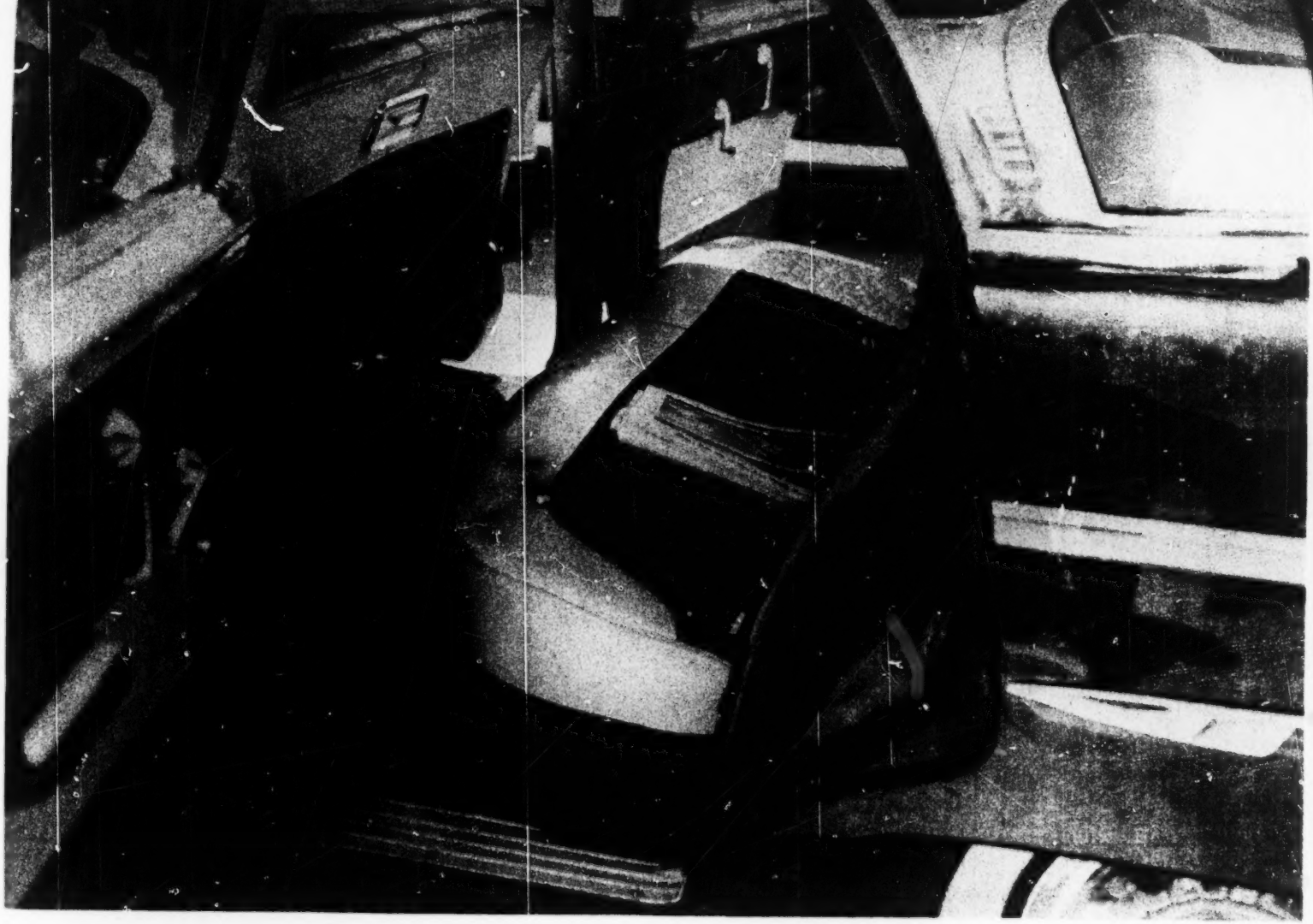
(Omitted pursuant to stipulation)

People's Exhibit 27

PHOTO (INSIDE OF CAR)

(See opposite ☛)

1380



1384

People's Exhibit 28

STATEMENT OF WILLARD H. PHILLIPS

DISTRICT ATTORNEY'S INVESTIGATION

———o———

THE PEOPLE OF THE STATE OF NEW YORK,

against

1385 WILLARD H. PHILLIPS,

Defendant.

———o———

Mineola, N. Y., May 14, 1958.

WILLARD H. PHILLIPS, being examined by Assistant District Attorney William Cahn at Police Headquarters, Mineola, N. Y., commencing at 5:10 A. M., May 14, 1958, made the following statement in the presence of:

1386 JOHN LOCKMAN, Assistant District Attorney
SGT. EDWARD CURRAN
NATHAN BIRCHALL, Stenographer

By Mr. Cahn:

Q. Mr. Phillips, my name is Cahn; I am an Assistant District Attorney of Nassau County. This is Mr. Lockman, Assistant District Attorney. What is your full name, sir? A. Willard Hodge Phillips.

Q. You are going to have to speak up so that I can hear you. A. Willard Hodge Phillips.

Q. And what is your address, sir? A. 38 Garfield Place, Hempstead.

Q. And how long have you been living there? A. Since August, 1957.

Q. Are you married? A. No, sir.

Q. Have you ever been married? A. Yes, sir.

Q. When were you married? A. 1936.

Q. Where were you married? A. Miami, Florida.

Q. To whom? A. Mynita Maddox.

Q. And what happened in reference to this marriage? A. It subsequently ended in divorce. 1388

Q. Where were you divorced? A. In Florida.

Q. Where in Florida? A. Tampa.

Q. And when were you divorced? A. 1944, I believe it was.

Q. Were you in the Army? A. In the Navy for a short spell.

Q. What? A. In the Navy for a few months.

Q. When did you get into the Navy? A. February, 1945.

Q. And when were you discharged? A. June the same year.

Q. Was it an honorable discharge? A. Yes. 1389

Q. Now, do you know Sunday Graham? A. Yes, sir.

Q. How do you know her? A. Through her mother.

Q. What? A. Through her mother.

Q. What is her mother's name? A. Mynita Graham.

Q. Is Mynita Graham the woman that you were married to? A. Yes, sir.

Q. Is Sunday Graham any relation of yours? A. No, sir.

Q. Is Sunday Graham any relation of Mynita Graham? A. It is her daughter.

1390 *People's Exhibit 28*

Q. Is that her true daughter? A. I believe she is an adopted daughter.

Q. After you were divorced from Mynita when was the next time that you saw her? A. I believe it was on Christmas the same year.

Q. Have you been seeing her steadily ever since your divorce? A. No, not steadily, but I have seen her on occasion.

Q. Where does Mynita Graham live? A. She lives in Hempstead.

1391 Q. Where in Hempstead? A. On Seabury Street.

Q. What number? A. 10.

Q. Did you see Mynita Graham Sunday? A. I saw her on Sunday night. Just in passing.

Q. What do you mean, in passing? A. Well, I was driving by in my car and she and the kids were in the Village of Hempstead window-shopping.

Q. What kind of a car do you have? A. A Plymouth 1955.

Q. Two-door, four-door? A. Four-door.

Q. What color is it? A. Black.

1392 Q. What is the license number? A. 8R8292.

Q. What time did you see Mynita Graham Sunday night? A. Well, I saw her between—about 8:30 to 9 o'clock. Thereabouts.

Q. And where was that? A. In Fulton Avenue, Hempstead.

Q. Who was she with? A. Two kids.

Q. What two kids? A. Her own two kids.

Q. What are their names? A. Sunday and Michael.

Q. And what? A. Michael.

Q. Michael? Did you speak to Mynita Graham that night? A. No, I didn't.

1393

Q. Did you say hello to her? A. No, I didn't. I just passed in the car.

Q. And you saw her? A. Yes, I did.

Q. Did she see you? A. I don't know whether she did or not.

Q. When before that did you see Mynita Graham? A. Saturday.

Q. Where did you see her? A. She was at the supermarket shopping.

Q. And what were you doing there? A. Well, I passed. I wasn't at the supermarket, but I met—I was going in one direction in the street and she was coming in the other and I honked the horn and recognized her and I came back to the supermarket and went in with her and we talked a while there while she shopped.

1394

Q. While she shopped? A. Yes.

Q. Did you have any argument with her, sir? A. No, I did not.

Q. What did you do Sunday night after you saw Mynita Graham? A. I went on up towards home, in Greenwich Street, and stopped by and bought some ice cream, and I went home.

1395

Q. What time did you get home, sir? A. After 9.

Q. And what did you do when you got home? A. Well, I finished the ice cream and looked at TV a while and then went to sleep.

Q. What time did you get up? A. 6:15 the next morning.

Q. And what did you do when you got up? A. Well, I was preparing to go out. I left home around 7 or thereafter.

Q. But what did you do when you got out of bed? A. Do you mean immediately, step by step?

1396 *People's Exhibit 28*

Q. Yes. A. Well, I got up and put on my robe and got ready and went to the bathroom, lavatory, and brushed my teeth, washed up, et cetera, combed my hair, came back and dressed and straightened up my room, and by that time it was near 7 o'clock or thereabouts.

Q. What did you put on? What clothes did you put on? A. A pair of trousers, a shirt and jacket.

Q. You weren't wearing underwear? A. Oh, yes, I had on underwear.

1397 Q. What kind of underwear were you wearing? A. A pair of shorts.

Q. Yes? A. And a T-shirt.

Q. A T-shirt? A. Yes.

Q. And what pants were you wearing? A. A pair of brown khaki type. Khaki style trousers.

Q. And the shirt? A. It was a brown sport type shirt.

Q. Did you wear anything else when you went out? A. A small zelan jacket.

Q. What? A. A short zelan jacket.

Q. Zelan jacket? A. Yes, a windbreaker they refer to it.

1398 Q. Anything else? A. My cap.

Q. What kind of a cap? A. An Ivy League cap.

Q. What color? A. White.

Q. Did you take a bath at any time? A. Not a tub bath. I washed up in the lavatory.

Q. Well, when you say you washed up, what do you mean, you washed your face, or did you wash your body? A. Well, I washed from the waist up and the lower part.

Q. Well, did you take a bath Sunday or a shower? A. Yes, I did.

1399

Q. When? A. During the day. I don't know exactly the hour or the time.

Q. I understand. After you left the house where did you go? A. Sunday?

Q. Yes. A. I went out to get my dinner.

Q. What about this underwear that you put on, was that new? A. No, it isn't new.

Q. Fresh? A. It was fresh at the time I put it on.

Q. A fresh pair of shorts and T-shirt? A. Yes.

Q. You weren't wearing the same shorts and T-shirt that you were wearing Sunday? A. Yes, they were the same ones.

1400

Q. Well, you just told me, Mr. Phillips, that they were fresh. A. Well, I thought you were referring to Sunday when you asked me did I take a bath.

Q. Well, Monday. A. No, I put the same shorts on Monday that I had taken off. I wore them down and had my dinner and was out a couple of hours and I came back home.

Q. Where did you go when you left the house? A. I went over to Rockville Centre and ate dinner.

1401

Q. No, I mean Monday morning after you got up. You said you washed and got dessed, and did you eat anything at the house? A. No, I did not.

Q. Where did you go when you left the house Monday morning? A. I went out to the Farmingdale area.

Q. What is this business about Rockville Centre? A. You keep going back to Sunday and then Monday.

Q. No, let us stick to Monday now, eh? When you went out of the house Monday morning where did you go? A. I went to Farmingdale.

1402 *People's Exhibit 28*

Q. Where in Farmingdale, sir? A. I went in the section over there looking for a building that was supposed to have been housing—as a matter of fact, doing the same kind of work that I had just got laid off last Friday down in the Pre-cast building section line.

Q. Did you find the house? A. No, I didn't find it.

Q. Did you speak to anybody? A. A couple of fellows.

1403 Q. Who? A. I don't know who they were, but one fellow he evidently was a truckdriver, because he was at the Gifford Construction Company and was filling the tank with gas from a gas pump, and I asked him—

Q. Just a moment. Where did you speak to this truckdriver? A. I turned off of Highway 110 there on a side road where I had been instructed in that area was this place I was looking for.

Q. What was the name of the place you were looking for? A. At that time I didn't know it, and I just obtained that information Tuesday. I understand the name is Flexicon.

1404 Q. Tuesday you obtained this information? A. The correct information, after I had gone on what could be called a wild goose chase on Monday morning, and I couldn't find this place. I spoke to two fellows and asked them—

Q. Two complete strangers to you? A. Yes, they were in the area and I figured they knew.

Q. You don't know their names? A. No, I don't. One was a colored fellow, as I say, that was putting some gas in a truck from a gas pump, and I told him that I was looking for a Pre-cast Building Incorporated section there—I didn't re-

1405

member the name of it, but I said I was told it was near the Colonial Sand and Gravel pits.

And he said, "No, I don't know." He said, "It might be the place down below the brewer's there, Schaefer's place."

I said, "O. K., thanks," and I left him and went back down the highway and on the way back I didn't see any such place and I got to a fence that says "Private Property," and I was first going in, but I didn't go in, and then I saw a young man carrying books under his arm and I stopped and asked him was it the white building across the other side of the highway, down one of those side roads, and he said it was a school down there, and I asked him did he know where this place—I was trying to make him know about that building or where it was, and he said he didn't, but he said it might be down the road further, but he didn't know too much about what was down there.

1406

So I got on what they call Melville Road or something and went around and around, not being familiar with the area, dead-end streets and circles around and that, and I went up near the old Bethpage golf course, in that area.

1407

Q. What time was this, Mr. Phillips? A. Well, during the morning, after 8 o'clock when I got out there. In that area, 8 to 9, 9:30 or so, about.

Q. And what did you do after that? A. Came back to Hempstead.

Q. Where in Hempstead? A. At first I went to the Hempstead bus terminal.

Q. Yes? A. And used the men's room, and then I came up to the Nedick shop on the ground floor.

Q. Would you like a cigarette? A. No, thanks.

Q. Did you see anybody in the Hempstead bus terminal you knew? A. No, I didn't see anyone.

1408 *People's Exhibit 28*

I did see a girl outside after I left out. I talked with a girl outside. She was waiting for a friend or a bus.

Q. What was her name? A. Claudia.

Q. Claudia what? A. Let's see, I believe it is Perry.

Q. Claudia Perry? A. I believe that's it.

Q. And where does she live? A. She lives at the Community House on Laurel Avenue, Hempstead.

1409 Q. And what time was it when you saw her? A. Excuse me. Let's see, now. It was between 9:30 and 10 o'clock, because I remember she says, "I'm waiting for this bus driver. I wish he would come on out."

And I said, "Well, it looks that you won't make work before 10 o'clock."

And she said, "I've got to get there before 10; otherwise it doesn't pay me to go."

So therefore I can estimate that it was between 9:30 and 10 o'clock.

Q. What did you do after you saw Claudia Perry? A. Well, I went across to Grant's five and

1410 dime store and purchased a record album.

Q. What kind of a record album? A. Well, it is called "Alltime Favorites."

Q. How much did you pay for it? A. $1.49.

Q. What did you do with the record album? A. I took it home.

Q. In your car? A. Yes.

Q. Did you go directly from Grant's to your home? A. Yes, I did.

Q. Did you see anybody in Grant's that you knew? A. No, nobody that I know personally. I know this fellow that works in the record department by the first name.

Q. What is his first name? A. Tony.

Q. Now, after you left Tony you say you went directly home? A. Yes.

Q. What time did you get home? A. Oh, near 11 o'clock.

Q. Did you see anybody that you knew when you got home? A. Mrs. Watson, the landlady.

Q. You saw her at that time? A. Yes.

Q. Did you speak to her? A. Yes.

Q. What did you do when you got home? A. I talked with her a brief moment downstairs and then I went upstairs and I told her I didn't feel 1412 well, I felt that I had gas, and I took some milk of magnesia and I laid down in the bed and subsequently I dropped off to sleep.

Q. How long did you remain in your room? A. Until after 2 o'clock.

Q. And then what did you do? A. I got up and went to the drugstore and got a newspaper.

Q. How did you go to the drugstore? A. It was right around the corner, Graham Avenue and South Franklin.

Q. Did you use your car? A. Yes.

Q. And you got a paper? A. Yes. 1413

Q. What drugstore did you go to? A. Park Lake drugstore.

Q. Who did you see there? A. Well, I saw Murray, the manager and owner. I don't know whether it is owner or manager. And I guess it is his father. We call him Pop, an old man.

Q. What paper did you buy? A. Newsday.

Q. And then what did you do? A. Then I got in my car and I went over to the State Unemployment office.

Q. What time did you get to the State Unemployment office? A. Near 3 o'clock. Between 2:30 and 3.

Q. And did you go in? A. Yes, I did.

Q. Who did you see there? A. I didn't see anyone that I know, but I talked to a lady at the information desk. That is the only woman I talked to.

Q. How long did you remain there? A. Until after 3 o'clock.

Q. How long after 3? A. I don't know exactly. I would say around 3:15, something like that, 3:20.

Q. And then what did you do? A. I went back up South Franklin and sat in the car and read
1415 the paper that I had recently purchased.

Q. Where on South Franklin did you read the paper? A. Sitting in my car parked diagonally across the street from the Franklin Bar and Grill.

Q. Did you see anybody you knew? A. I don't recall while I was sitting in the car seeing anyone that I knew.

Q. Well, you would recall, Mr. Phillips, wouldn't you? A. No, I said I didn't see anyone that I knew. I was engrossed in the paper, so I wasn't paying any attention to passersby. No one passing said anything to me, so I didn't—

1416 Q. And you didn't have any conversation with anybody? A. Not while sitting in the car.

Q. All right, how long did you sit in the car? A. I sat there thirty minutes or more. Thirty or forty minutes, give or take ten minutes. I don't know the exact time.

Q. Then what did you do, sir? A. I went over across the street to Mrs. Clemens' house and asked her was her oldest daughter home. I said, "Where is your big girl?" She said, "She's out."

Q. Which big girl were you referring to? A. Her daughter named Annie.

Q. Annie? A. Yes.

Q. How old a girl is she? A. About 19 years old.

Q. What did you want to see her for? A. Well, I just walked in. I go in there and kid with them a lot, and I play around with her.

Q. And when you asked for Mrs. Clemens' big girl what did she say? A. She says, "She's out."

Q. Yes, and then what did you do? A. Well, I stayed a few minutes and played with the smaller kids, and usually I go there a lot of times and—

Q. Let us not go into what you usually do. I want to know what you did on this Monday. A. 1418
Well, this brings about the mention of Sunday. They played with me and I played with them. Sometimes I have candy for them, et cetera.

So on this occasion we played. They wanted to go with me and I told them I couldn't take them with me, I had somewheres to go. I usually have a game with them.

Q. How long did you stay with Mrs. Clemens' little kids? A. Ten or fifteen minutes, about.

Q. About what time was that? A. Between 3:30 and 4 o'clock, about.

Q. And then what did you do, sir? A. I came 1419
over to Mineola to keep an appointment that I had over there.

Q. To keep an appointment that you had? A. Yes.

Q. With whom? A. Long Island Master Waxers, Incorporated, over there. I called them about an offer they had in the paper.

Q. You what? A. I had called them in the morning about an offer they had in the paper.

Q. In the morning? A. Yes, I had called them.

Q. When did you make the call in the morning? A. While I was in the five and dime store.

1420 *People's Exhibit 28*

Q. Who did you speak to? A. I don't know. It was a lady, a receptionist there. She answered the phone and I told her I was calling in reference to an ad they had in the paper offering floorwaxing opportunities, to do this floor-waxing on part time. So she asked me to come in in the afternoon after 3 and before 6.

Q. I see. And what time did you arrive there? A. Right after 5 o'clock.

Q. And who did you speak to? A. I spoke to this lady. I assume she was the same lady that
1421 answered the phone. And she gave me a blank and says, "Fill this out," and I filled it out and I waited my turn and then I was eventually called in to see the manager, Mr. Scott.

Q. And then what did you do? A. Well, I stayed there with him and we perused and went over the material and reading matter, et cetera, and he gave his offer and I accepted it subject to the approval of the bank financing on the buying of the machine, et cetera.

And I left and I went back by Grant's to take the record, to change the one that I had bought
1422 in the morning because it was not as represented.

Q. Yes, and what did you do? A. I got the record changed.

Q. Then what did you do? A. Then I left and went up to Johnnie Mae's Luncheonette and I ate dinner.

Q. And then what happened? A. When I finished eating I called Mrs. Graham and she asked me was I home and I told her, "No, not yet." And she said, "Well, I called your house and they said you was out."

I said, "Yes, I just came from Mineola where I was talking to the man about the floor waxing."

And she then told me that Sunday had not got home. I said, "Got home from where?"

She said, "She hasn't got home since school was out."

So I said, "Well, gee, it's past seven o'clock and she hasn't gotten home yet?"

She said no, and she was all worked up over it and I said, "You know people that know where she is." And then I said, "I started home at a late hour, I don't feel well, but I will get out and look for her." And she told me her brother was around looking. 1424

Q. And then what did you do? A. Then I went home.

Q. Yes? A. I talked to Mrs. Watson a few minutes and she told me that she had received a call for me from Mrs. Graham, and I told her I had just talked with her by telephone.

Then we talked about, she had told her the same thing she told me, that the child was missing and hadn't come home from school.

And I left to go out and I met Mrs. Graham's brother, so we talked a few minutes, him and his wife, and then I went around and scouted the 1425 neighborhood and went around to my friends' houses and asked about Sunday.

Q. Yes? A. And then I chased around to different places, passed the different school yards where the kids was playing, and I asked one boy, Peewee, had he seen her, and he said he saw her walking down Elizabeth Avenue after school. And I asked him did he talk with her and he said he just said Hi and she said Hi, and he came home.

Q. You saw Peewee there? A. I saw him in the side street playing with kids.

1426 *People's Exhibit 28*

Q. At what time was this? A. Near 8 o'clock. Between 7:30 and 8 o'clock.

Q. All right, then what did you do? A. I continued to look up and down street after street.

Q. Yes? A. And eventually I went to Roosevelt, to my cousin, and mentioned it to her and she asked me to bring her back to Hempstead so she could go to Mrs. Graham's and see if she could help in consolation. And I brought my cousin back and I left her.

1427 Q. And then what did you do? A. I went back up near Mrs. Clemens' house and I talked—

Q. Mrs. whose house? A. Clemens, on South Franklin. Near the bar, the Franklin Bar and Grill.

And I parked out there a while and I talked to her and then I went in the house and talked to she and I talked to her daughter. And the same lady was there that was there that afternoon when I left her.

Q. And then what happened? A. I went back outside and I told her, I said, "It's time to move my car because it can't be parked here after 9

1428 o'clock."

And I started talking to a fellow there that lived next door, and another guy came up and asked me would I give him a push, and I gave him a push down the street and turned around and went back, and went back and asked my cousin was she ready to go back home, and she said no.

I said, "Well, I'm tired. I'm going home and lay down, and if you can't get nobody to take you home, give me a call and I'll come over." So I went home between 10:30 and 11 o'clock.

Q. Do you have your own phone? A. No, I don't. Mrs. Watson's.

1429

Q. What is the telephone number? A. IV-9-5503.

Q. IV-9— A. Ivanhoe, yes.

Q. Well, now, Mr. Phillips, you haven't been telling me the truth, have you? A. Yes, sir.

Q. You were seen picking up Sunday at the school. A. I didn't go to the school.

Q. Pardon? A. I didn't go over to the school to pick her up.

Q. Well, you know that isn't so. Don't you, Mr. Phillips? A. No, sir.

1430

Q. Mr. Phillips, how did you get the blood on your underwear and on the bottom of your T-shirt A. I didn't know any blood was on my T-shirt or underwear.

Q. Pardon? A. I didn't know any was on there, sir.

Q. On the fly of your undershorts and on the bottom of your T-shirt, Mr. Phillips, and it turns out to be Sunday's blood. Now, how did that happen, Mr. Phillips? What happened after you picked Sunday up at the school? A. (No answer.)

1431

Q. You're not answering me. A. No, sir.

Q. What happened after you picked Sunday up at the school? Where did you take her—Mr. Phillips? A. Yes.

Q. Where did you take her? A. (No answer.)

Q. I'm asking you a question, sir. A. Yes, sir.

Q. Where did you take Sunday after you picked her up at the school? A. (No answer.)

Q. Why don't you answer me, Mr. Phillips? A. I will.

Q. You will? Where did you take her? A. (No answer.)

1432 *People's Exhibit 28*

Q. You are still not answering it. Where did you take her, sir? A. I will answer.

Q. Well, where? A. Can you call Mr. Pinnell in, and the Captain?

Mr. Cahn: Yes, certainly. Would you call Inspector Pinnell and the Captain?

The Defendant: Is the other officer in there?

By Mr. Cahn:

1433

Q. Which officer is that, Mr. Phillips? A. I don't know his name. The one in the brown suit.

Q. Would you like him in? A. And the other officer. I believe his first name is Danny, I believe.

Mr. Cahn: Call in Danny Stark. And would you come in, Chief, please, and Captain Lada and Detective Danny Stark?

(Chief Inspector Pinnell, Detective Stark and Sergeant Cummings enter the room.)

1434

The Defendant: Do you mind if I stand?

Mr. Cahn: No.

The Defendant: May I shake your hands?

(Defendant shakes hands with Inspector Pinnell, Detective Stark and Sergeant Cummings.)

(Captain Lada entered the room.)

Mr. Cahn: He wants to shake hands with you, Captain Lada.

(Defendant shakes hands with Captain Lada.)

Captain Lada: Are you telling the truth now?

The Defendant: Yes.

Captain Lada: You are doing the right thing, I'm telling you.

Mr. Cahn: Why don't you sit down, Mr. Phillips?

Captain Lada: Do you want a cup of coffee?

The Defendant: No.

Mr. Cahn: Mr. Phillips, sit down.

(Inspector Pinnell, Captain Lada, Detective Stark and Sergeant Cummings left the room.)

By Mr. Cahn:

Q. Now, do you want a cigarette, sir? A. (No answer.)

Q. All right, now, Mr. Phillips, where did you take Sunday when you picked her up from the school? A. May I see her mother again so I can talk?

Q. Yes, afterwards, certainly. A. Yes, and her brother.

Q. And her brother? I promise you that, sir. A. I'm sunk.

Q. Well, we knew that before, but maybe if you tell us exactly what happened—where did you take Sunday? A. We rode around a bit, just talking.

Q. Yes. A. The same as we have always done.

Q. Where was she sitting in your car, in the front seat? A. Yes.

Q. Yes? A. And I say—

1438 *People's Exhibit 28*

Q. I can't hear you, sir. A. She started fighting and arguing about "Take me home, take me home."

Q. Yes? A. And I must have—I don't know, you know, went blank, I guess. She was fighting for breath, fighting for air.

Q. Why was she fighting for air? A. Because I was choking her.

Q. You were choking her? A. Yes.

Q. With what were you choking her, Mr. Phillips? A. My hands, I think, or my arms or
1439 something.

Q. Yes? A. And she—it seemed like she just woke me out of some realization, saying, "You're choking me, you're choking me." And then I realized it was too late.

Q. When did you take off her pants? A. I don't remember taking off her pants.

Q. Well, now, you put her pants in her mouth, didn't you? A. Yes, I must have. I found them there.

Q. Was this in the car? A. Yes.

Q. Where were you parked? A. Somewheres
1440 down in—let me see, the area off Babylon Turnpike.

Q. Off Babylon Turnpike? A. Yes, in the Freeport section.

Q. In the Freeport section? A. Yes.

Q. All right, now, where did you have intercourse with her? A. That must have been there.

Q. Was she still alive when you had intercourse with her? A. I guess she was.

Q. Well, did she scream? A. She must have, because there was groaning and breathing, et cetera.

1441

Q. I don't hear you. A. There was breathing and gasping going on, so I expect she must have been.

Q. Did she tell you to stop? A. No, she probably gagged at that time.

Q. Were her pants all in her mouth? A. Yes.

Q. They were? Is that right? A. Yes.

Q. All right, did you finish? A. Yes.

Q. Did you come? A. Yes.

Q. And did you notice any bleeding? A. No, sir.

1442

Q. You didn't? Now, after—by the way, this was in the front seat of the car? A. In the back seat.

Q. In the back seat? And did you have your pants on or off? A. On.

Q. Your fly was open? A. Yes, it was a zipper fly.

Q. Just your fly? You didn't have your pants off? A. No.

Q. All right, now, after you finished—you finished inside of her, did you? A. Yes.

Q. Did she tell you at any time that you hurt her? A. I guess she did. Yes.

1443

Q. And is that when you put the pants in her mouth? A. Yes.

Q. She started to scream, did she not? A. Yes.

Q. And you put her pants in her mouth? A. Yes.

Q. Well, when you were having intercourse with her what did you tell her you were doing? A. I don't think I told her anything.

Q. Did she want to have intercourse with you? A. No.

1444 *People's Exhibit 28*

Q. Did she tell you to stop? A. Yes.

Q. And about what time was this? A. I don't know the time then.

Q. Well, how long after you picked her up at the school did this happen? A. I don't know. Twenty minutes or a half hour or so.

Q. About twenty minutes to a half hour after you picked her up from the school? A. Yes.

Q. All right, now, after you finished inside of her what did you do? A. Took her belt and
1445 put it around her to stop her from fighting and going on.

Q. Yes, and then what did you do? A. I got panicky, I guess. I don't know. I call it panic.

Q. Well, what did you do after that? A. I drove and drove and drove. Just drove around. I didn't know what to do then.

Q. Where was the body when you drove around? A. In the back seat.

Q. Where did you drive? A. I just drove around. I remember coming off Babylon Turnpike. I remember coming on through Hempstead. Just headed towards Mineola.

1446 Q. All right, and then what happened? A. And I rode out by Mitchel Field, through that area to Uniondale Avenue, and come back around Mitchel Field and went down where those warehouses are over there, and that's where I left her.

Q. About what time did you leave her in back around Mitchel Field? A. About 5 o'clock.

Q. About 5 o'clock in the afternoon? A. About. That is judging from the time I noticed when I got over to Mineola.

Q. How did you leave her? What did you do? A. Just laid her out the best I could there.

Q. Face down or face up? A. She was laying on her back.

Q. She was laying on her back, face up? A. Yes.

Q. And then what did you do after you left her? A. I hurried away.

Q. Where did you go? A. I came to Mineola.

Q. Mineola? A. Yes. I kept the appointment there.

Q. Kept the appointment with Mr.— A. Scott.

Q. Mr. Scott? A. Yes. 1448

Q. Where did you go before you picked her up at the school? A. I went and bought a newspaper.

Q. Yes? You didn't see Mrs. Clemens that day, did you? A. Yes, I did.

Q. You did? A. Yes.

Q. And it was after you saw Mrs. Clemens that you picked her up at the school? A. Yes. I didn't pick her up at the school.

Q. Where did you pick her up? A. I met her coming down Cruikshank Avenue.

Q. Cruikshank Avenue? That's where you met 1449 her? A. Yes.

Q. And when you picked her up in the car what did you intend to do, when you picked her up in the car? A. I didn't recognize her—I didn't see her at first. Then I just recognized her and she ran up to my car and I stopped and I said Hi, and she said Hi, and I said, "Come on, are you going home?"

She said yes. Then she said, "Well, daddy is home. Don't take me home."

I said, "O.K., I'll take you near home." And then we started riding.

(Sergeant Curran left the room.)

Q. When did you get the idea you were going to have intercourse with her? A. After I went around Greenwich Street.

Q. After you went down Greenwich Street you got excited, did you? A. Yes, I must have. So much of it is blank. I can't fill it in. I can't recall the whole thing step by step. Some things I can remember and some is like a dream. Very hazy.

Q. I see. Well, after you were going down Greenwich Street you told me you decided you were going to have intercourse with her, is that right? A. Yes.

Q. Is that right, sir? A. Yes.

Q. Well, you knew that was wrong, didn't you? A. Well, I figured I could persuade her.

Q. But you knew to have intercourse with her would be wrong. Didn't you know that, Mr. Phillips? A. Yes, I must have known, but I figured I could persuade her. I must have—I don't know.

Q. But you knew that having intercourse with an 8-year-old child is wrong, didn't you? A. Yes. But age is something I imagine that didn't occur to you at that time. You just—I imagine you see something when it went before you, and it was just at the wrong time.

(Sergeant Curran returned to the room.)

Q. And as a result of her not wanting to have intercourse with you and screaming that it hurt, you put the— A. She started to fight. You know how those things are.

Q. And you put her panties in her mouth? A. Yes.

Q. And then you put the belt around her neck? A. Later.

Q. Later? And you kept the panties in her mouth? A. Yes.

Q. Was that to stop her from screaming? A. Yes.

Q. And you were back on Babylon Turnpike in the Freeport area? A. Yes. Well, I call it the Freeport area. It is off the parkway there somewhere, there is a little siding there.

Q. Now, how long would you say you rode around, for about two hours? A. Yes, about two hours.

Q. Were you near your cousin's house when this—when you had intercourse with her? A. No.

Q. You were nowhere near your cousin's house? A. Well, it all depends on how many miles you call near.

Q. Well, about how many miles were you away? A. Well, some two or three miles.

Q. You remember where you were when this happened? A. About, yes.

Q. And you can show that to the detectives, can't you? A. I believe so.

Q. When you got home what did you do? A. When I got home?

Q. After you left Mr. Scott and you kept your appointment. A. Well, I went out along the street.

Q. Yes? A. I went out along the street.

Q. Yes? A. Yes. All the rest is—I'll tell you the time and you can delete the times that this fills in, and the rest is all right.

Q. Well, did you change your underwear at any time when you got home? A. No.

Q. The peanuts that were found in Sunday's hair came from the back seat of your car? A. I imagine they must have.

1456 *People's Exhibit 28*

Q. Because as I understand, Mr. Phillips, you had taken Sunday and her mother to the circus a week before. A. Well, a little more than a week.

Q. Around a week? A. That's right.

Q. And you had peanuts in the car? A. Yes, sir.

Q. What did you do with Sunday's shoes? A. I didn't do anything with them.

Q. Well, did you put them on top of her body when you dropped her off? A. No. I don't remember that.

1457 Q. You don't remember that? A. No.

Q. After you picked her up did you stop for ice cream? A. Yes.

Q. You had ice cream with her? A. Yes, I bought two ice creams on a stick.

Q. Where did you buy that? A. Passing by. One of the little trucks.

Q. Which— A. Something like—

Q. Good Humor? A. Something like Good Humor.

Q. Or Judy Ann? A. Yes, Judy Ann.

Q. It was Judy Ann? A. Yes.

1458 Q. What did the ice cream man look like? A. I don't know. He was a guy wore glasses, I imagine about his height and build (indicating Mr. Lockman).

Q. Pardon? A. A guy that wore glasses, and I imagine about his height (indicating Mr. Lockman).

Q. A tall man? A. Yes.

Q. Young or old? A. Yes, young.

Q. What happened to Sunday's catechism book? A. I don't know.

Q. Was she wearing any beads, rosary beads or any kind of beads? A. Not that I know of.

Q. You don't remember that? A. No.

Q. About what time did you pick Sunday up? A. Somewheres just before 3 o'clock. I assume it must have been before 3.

Q. Pardon me? A. Before 3 o'clock.

Q. You said you wrapped the belt around Sunday's neck afterwards. Was that to make sure she was dead? A. It must have been. I don't know what was in my mind then. You just went through motions or something without any thought. You just couldn't think. I don't know what the reason is. Just possibly automatic motions you go through. I don't know.

Q. Well, you took the belt off after you had put the panties in her mouth, isn't that right? A. Yes. I was holding the panties in her mouth.

Q. You were holding them in and kept shoving them in her mouth, isn't that correct? A. I don't remember shoving them in, but I knew it was there. I saw it. After the panic started, I don't know.

Q. Well, then, afterwards you took her belt and you put it around her neck, didn't you? A. I told you that.

Q. Well, that was to make sure she was dead, wasn't it, Mr. Phillips? A. That reasoning on your part is as good as anything I could give. I don't recall having any reason whatsoever. It possibly is true.

Q. Well, before you told me what you did you crossed yourself, did you not, Mr. Phillips? A. I crossed myself?

Q. Yes. A. I did?

Q. You made the sign of the crucifix, did you not? A. Yes. I said a little prayer.

Q. And you said a little prayer because you knew you did wrong, did you not? A. Yes.

(Statement concluded at 6:01 A. M.)

1462

People's Exhibit 29

May 14, 1958

Homicide 502-58
DD 982-3-58
Time Started 0605

Statement of Willard H. PHILLIPS:

My name is Willard H. PHILLIPS, I am 42 years of age and I live in a furnished room at 38 Garfield Place, Hempstead. I rent this room from Mrs.
1463 Clara WATSON. I am a laborer and presently I am unemployed. My last job was at the Pre-Casting Company, New Hyde Park. I was born in Dublin, Georgia on March 27, 1916.

On Monday, May 12, 1958 at a little before three in the afternoon I drove my car a 1955 Plymouth four door sedan, color black, with whitewall tires, stopped
~~down Gr~~ and I ~~parked~~ on Cruikshank Avenue and I picked up Sunday GRAHAM, an eight year old girl who is the daughter of my former wife Mynita GRAHAM. Once she was in the car I drove down
1464 Greenwich Street towards Roosevelt. I turned off in Roosevelt on the Babylon Turnpike I drove on down to near the Parkway and I stopped the car. Once I had stopped the car I started to make advances towards SUNDAY GRAHAM. She attempted to fight me off. I guess at this point I lost my head. She was already laying down at this time. I don't remebre taking her pants off but I do remember her starting to scream. I then took her pants and shoved them in her mouth to stop her from screaming. I then had intercourse with her, she was alive at this time. During this time I can remember choking her and I panicked.

I couldn't think of anything right to do. All I could think of was, "what have I done, what will her mother think, why did I do this". I can't recall how long all of this took, but then I realized that she was dead, at least I thought that she was. I can also remember taking a belt that she was wearing on her dress and wrapping this tightly around her neck. This was all before I started the car to leave this spot. She was on the back seat at this time. ~~H~~ I left her there and I got into the drivers seat and drove off. I went back up Babylon Turnpike through Roosevelt to Hemp-

stead. I then drove on and I was just riding and I didn't know what to do. I finally wound up on Commercial Avenue in Garden City near Mitchell Field. I think I got there about five in the afternoon. I came to what seemed to be warehouses and it seemed like a deserted area so I drove my car near the back of one of the warehouses. I took her out of the car and I laid her down over next to the rear of the warehouse. I don't remember what I did with her shoes. When I laid her there she still had the panties in her mouth and the belt around her neck. I got back into my car and I drove away. I went to Mineola then to keep an appointment I had with Mister SCOTT on 32 Third Avenue, Mineola, which was in regards to a part time floor waxing job.

I wish to say at this time that right after I first picked SUNDAY up and while I was driving along Greenwich Street and had just passed Kennedy Park I saw an Ice Cream Truck and I stopped and bought each of us an ice cream pop. I then drove on.

1468 *People's Exhibit 29*

At Police Headquarters I was shown a belt, I have identified this as the same belt that SUNDAY was wearing and that I put around her neck, I have initialled it with my initials WHP. I was also shown clothing that SUNDAY wore and I have identified and initialled it with my initials WHP.

I also wish to say at this time that when I took her out of the car in back of the warehouse SUNDAY was on the rear floor. I do not know how she got there.

1469 During the time of this incident I was wearing a white cap, light tan windbreaker jacket, tan shirt (sport), tan trousers, tan shoes, and brown checked socks.

I have given this statement to the detective who is typing it for me I have read and signed it and it is the truth to the best of my knowledge
Time Completed 0640

WILLARD H. PHILLIPS

Witness: Sergeant E. Curran, 78, Third Squad
Detective D. Stark 68-Homicide

1470

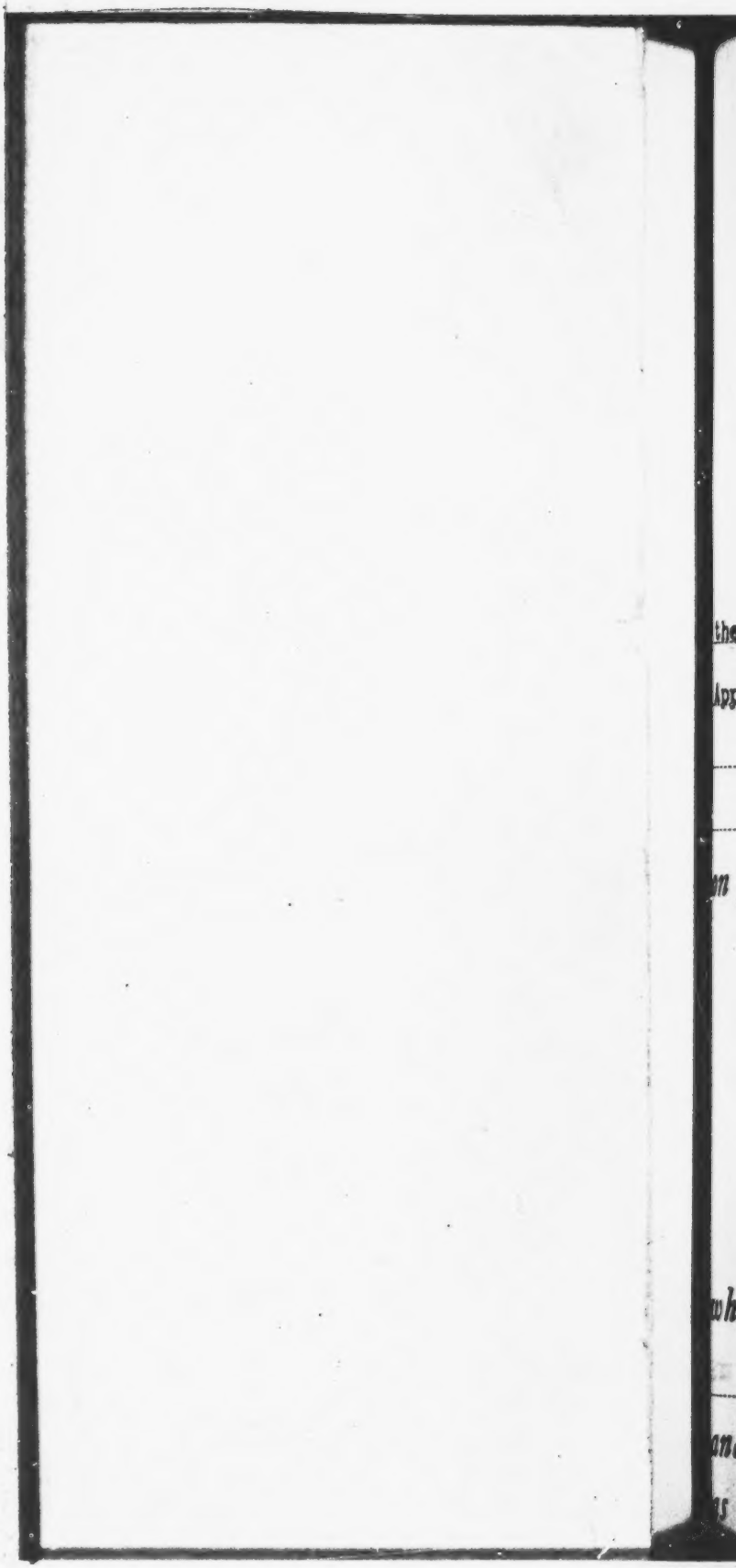
Defendant's Exhibit A

LAND MAP

(Omitted pursuant to stipulation)

Defendant's Exhibit B

NAVY RECORD OF DEFENDANT



United States of America

DEPARTMENT OF THE NAVY

Washington, D. C., 7 July 1958

I hereby certify *that the annexed* autostats are true copies of pages of the service record of Willard Hodges Phillips, 910 83 06, former entice Seaman, United States Naval Reserve

ile in the Bu au of Naval Personnel

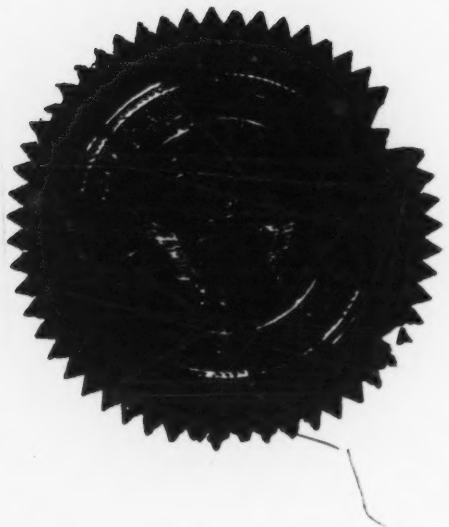
H. P. Smith
Vice Admiral, USN
Chief of Naval Personnel
(Official title)

OFFICE OF THE SECRETARY

I hereby certify *that* H. P. SMITH *signed the foregoing certificate, was at the time of signing*

CHIEF OF NAVAL PERSONNEL

that full faith and credit should be given his certification uch.



In testimony whereof, I have hereunto set my hand and caused the Seal of the Navy Department to be affixed this Ninth day of July, one thousand nine hundred and Fifty-eight

Chester Ward

NAVJAG 24

16—58516-1

CHESTER WARD
Rear Admiral, USN
Judge Advocate General
For the Secretary of the Navy

U.S. Form 601

C. O. Order No. _____

910 83 06 PHILLIPS, Willard Hodges
(SERVICE NUMBER) (SURNAME) (FIRST NAME) (MIDDLE NAME)

AS (RATING) USN ☐ RET ☐ USNR ☒ V-6 (CLASS) _____ (CDC NO.) USN(I) ☐

USNTC GREAT LAKES, ILL.
(SHIP OR STATION)

☒ First Enlisted
☐ Reenlisted
☐ Inducted
} 14 Feb. 1945 (DATE)
{ ☒ for 2 years
{ ☐ for duration
{ ☐ during minority
until _____ (DATE)

Accepted for enlistment or induction at LB #36, 307 Lenox Ave., New York, N. Y.

Reported for active duty 14 Feb. 1945 (DATE) (Fill in this section in connection with cases of naval reservists and retired enlisted men only).

Place from which ordered to active duty LB #36, 307 Lenox Ave., New York, N. Y.

Last previously enlisted on _____ (DATE) for _____ years,

or during minority until _____ (DATE) and was discharged on

_____ (DATE) with _____ (CHARACTER OF AND REASON FOR DISCHARGE)

as _____ (RATING) Completed _____ (NUMBER) years service on _____ (DATE)

If last enlistment NOT extended, or extended only 1 year, net time served in enlistment and extension if any. _____ (YEARS) _____ (MONTHS) _____ (DAYS)

If last enlistment extended 2 or more years, net time served in extension only. _____ (YEARS) _____ (MONTHS) _____ (DAYS)

Time (was ☐) (was NOT ☐) lost during above enlistment or extension because of AWOL, AOL or NEOL.
Permission (was ☐) (was NOT ☐) granted to make up time lost.

Other Service (Act 6-16-42) _____ (YEARS) _____ (MONTHS) _____ (DAYS)

Net Service completed on date of last discharge. _____ (YEARS) _____ (MONTHS) _____ (DAYS)

Naval Service to include date of last discharge. _____ (YEARS) _____ (MONTHS) _____ (DAYS)

Medals awarded:

Deserter or Straggler from _____ (SHIP OR STATION)

on or about _____ (DATE). Take up the account as of _____ (DATE)

date following date of return to Naval Jurisdiction.

(1)

Citizenship US

Place of birth Dublin, Ga.

Date of birth 27 May, 1916

Home address 370 Manhattan Ave.,
New York, N. Y.

Next of kin Bessie Brown

Relationship Mother

Address 359 N.Y. 10th St., Miami, Fla.

Education 4 Yrs HS

Reason for enlistment WOOD OPR-CLOTHES CLEANING MACH

Branch of service for which best suited

Do you expect to make the Navy a career?

Trade schools attended

Special duties for which qualified

Language qualifications

Credited to Congressional District 12

State of New York

I certify that no promise of any kind concerning assignment to duty or promotion during this enlistment has been made.

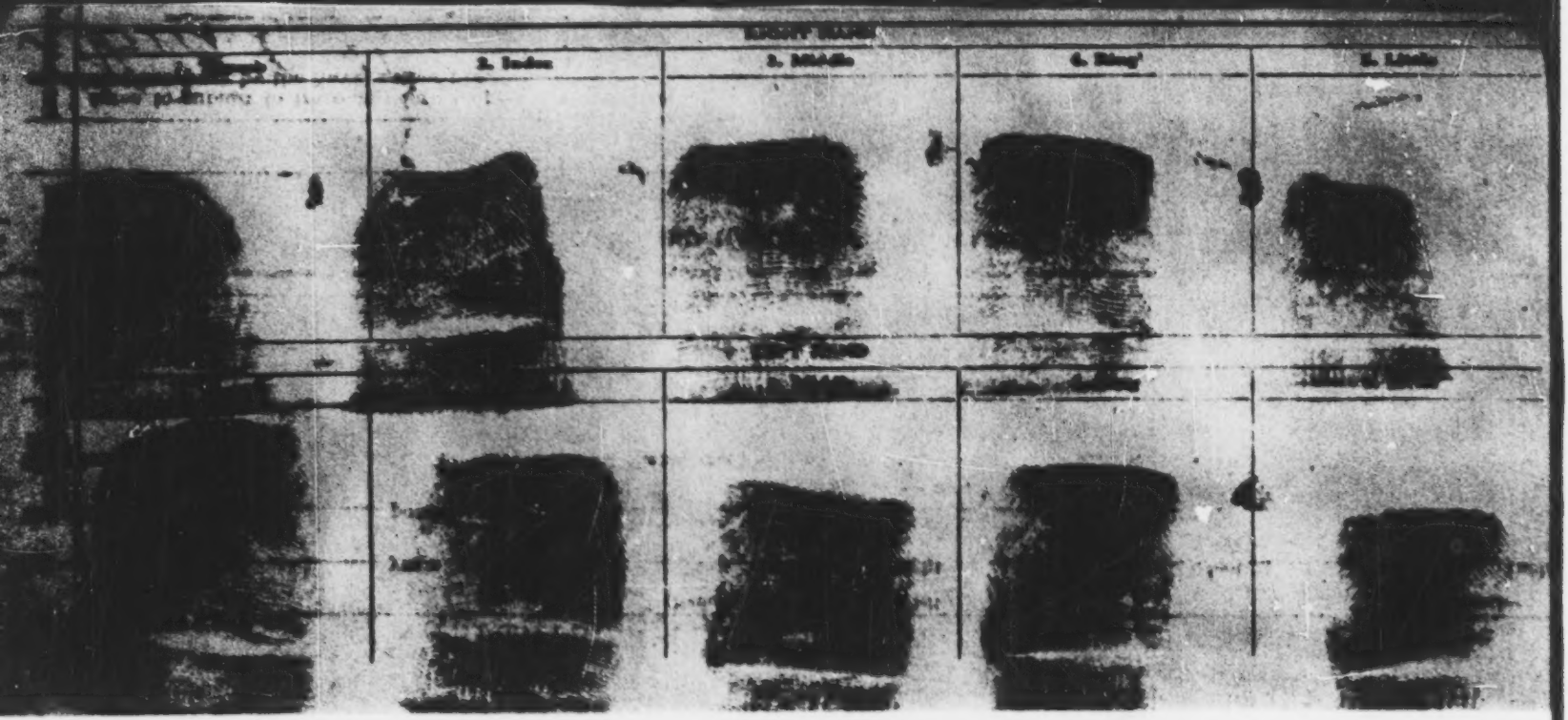
JOHN HEINEN, Jr., Lt. (jg) USN (Ret)

(SIGNATURE AND RANK OF RECRUITING OFFICER)

N.R.S. NEW YORK, N.Y.

(STATION)

(2)



Defendant's Exhibit B (Cont'd)

(See opposite ☞)

DESCRIPTIVE LIST OF PHILLIPS, Willard Hodges 910-83-06

(Name in full, surname to the left.) (Service number.)

Age 28 years 10 months. Height 5 feet 4 inches.

Weight 132 pounds. Eyes ne ro Hair negro

Complexion negro Personal characteristics, marks, etc. ANT. vs lup m;

½' lrs ; cs 1" lshin; PO ST ½ lhed; bmk rbck

DATE AND NATURE OF ANY WAIVER

I agree to submit to treatment for the prevention of smallpox, typhoid (typhoid prophylaxis), and to such other preventive measures as may be considered necessary by the Naval authorities.

Willard Hodges Phillips

Signature of recruit, in his own handwriting.

Signature and rank of Medical Officer, USN

16—43321-1

Name _____
(Name in full, surname in the left)

Service No. 910 83 06

Station NRS New York, N. Y.
(Place)

14 FEB 1945
(Place) (Date)

Under the provisions of the Act approved May 22, 1928, as extended by the Act of March 17, 1941, directing the payment of 6 months' pay to the widow, children, or dependent relative of any of the personnel on the active list of the Regular Navy, or on the retired list when on active duty, or of any of the personnel of the Naval Reserve called or ordered into active naval service by the Federal Government for extended naval service in excess of 30 days, who dies of wounds or disease not the result of his or her own misconduct, I give below the name and address of my wife and that of each of my children:

Not married
(Full name of wife; if not married, so state)

(Address of wife)

(Full name of child; if none, so state) (Date of birth)

(Address of child)

(Full name of child) (Date of birth)

(Address of child)

(Full name of child) (Date of birth)

(Address of child)

In the event that payment cannot be made to the above-named relative, I then designate as my beneficiary under the said act the following relative, my

Mother
(Relationship)

Bessie Brown
(Name in full)

359 N.W. 10th St., Miami, Fla.
(Address)

*

* If the beneficiary named above is your father, mother, brother, or sister, you need not fill in these three lines. If the beneficiary is a more distant relative, such as a grandparent, state briefly wherein dependency exists, such as "allotments registered," "regularly contributions by Government check," indicating amounts and regularity thereof.

[OVER]

[redacted]

Name ..... (Last, first, middle)

Service No. .....

Rose Phillips (wife)

Claims to Pay .....

513 Garfield St., Dublin, Ca.
(Address)

*

* In case of relatives more distant than your parent or brother or sister, state briefly wherein dependency exists, indicating amounts and regularity thereof.

I CERTIFY that I will inform my Commanding Officer immediately of any changes in marital status, or conditions of dependency, or of voluntary occupancy of public quarters by my dependents.

I CERTIFY that there has been no change in condition of dependency between .....

and .....

I do solemnly swear (or affirm) that the facts stated and disclosed in the foregoing are true to the best of my knowledge and belief.

Willard Hedges Phillips
(Name)

AS, USN-I
(Rank or rating)

U.S. Navy, Marine Corps.

Subscribed and sworn to before me this .....

day of 14 FEB 1945, 19....., I having authority to administer oaths.

[redacted]

INSTRUCTIONS

This form must be sworn to before an officer of the United States Navy or Marine Corps authorized to administer oaths, or before a notary public.

The full names and addresses of the beneficiaries must be stated carefully. If a married woman, her own given name should be stated; thus: "Mrs. Anna May Smith," not "Mrs. John Smith."

This slip shall be made out and handled as follows:

Enlisted men, Navy: In duplicate; one copy to Bureau of Naval Personnel, one copy secured inside service record. In cases of men entitled to money allowances for quarters for enlisted men with dependents, two additional copies, bearing the required certificate, to the Disbursing Officer.

Enlisted men, Marine Corps: In duplicate; one copy to Commandant, Marine Corps, one copy secured inside service record.

New beneficiary slips shall be executed and forwarded as above in all cases of change in status of the persons or in that of his or her beneficiaries.

In any event, payment will be made to the widow or children, if any whether designated or not.

Name PHILLIPS, Willard Hodges
(Name in Full, Surname to the Left)

910 83 06 (Service No.) Rate AS-USN-I

Date Reported Aboard: 14 FEB 1945

NAVY CRUIT, NEW YORK, N.Y.
(Present Ship or Station)

INDUCTEE
(Ship or Station Received From)

14 FEB 1945 "Indicated willingness to serve in the United States Navy and was actually inducted therein in accordance with the established Navy induction procedure."

Inducted this date as App.Sea.,USN-I, in accordance with Selective Training & Service Act of 1940, as amended.

J. R. MOORE, LT(JG)USN(RET)
Asst. to Officer in Charge.

14 FEB 1945 "Voluntarily enlisted as AS V-6 USNR SV, this date, to serve for a period of two (2) years. BNP Form 603 (Shipping Articles) executed."

PLACED ON ACTIVE DUTY THIS DATE IN ACCORDANCE WITH RCL #11-44.

TOOK EDDY TEST-RESULTS NOT OBTAINED

NAVPERS 668 (FAMILY ALLOWANCE) EXECUTED AND COPIES FORWARDED.

Date Transferred 14 FEB 1945

To NTS [illegible] [illegible]

J. R. MOORE, LT(JG)USN(RET)

Date Received Aboard: 7 FEB 1945

[illegible] [illegible]
(New Ship or Station)

USNRS NEW YORK N.Y.
(Last Ship or Station)

U.S.N.R.M. [illegible], Comm[illegible]
(Signature and Title of Commanding Officer)

Defendant's Exhibit B (Cont'd)

(See opposite ☛)

910 83 06 Rate AS, V6, SV

(Service No.)

Date Reported Aboard: 17 FEB 1945

USNTC GREAT LAKES, ILL.

USNRS NEW YORK, N.Y.

(Ship or Station Received From)

Substance of contents of Soldier's and Sailor's Civil Relief Act of 1940 and of Public Resolution No. 96, 78th Congress, has been explained to this man.

REC'D GAS MASK DRILL AND CHAMBER INSTRUCTION.

RECEIVED RIFLE RANGE INSTRUCTION.

NIGHT LOOKOUT TRAINER.

.....Qualified Swimmer, "third class."

Date.....

NIGHT VISION TEST with Radium Plaque ADAPTOMETER.

PASS..... FAIL .....

Note: Men who are Fail should not be used for night lookout duties. Select lookouts from the Pass group on the basis of other qualifications.

RETEST after SIX MONTHS. FAILED EYE T[illegible]

26 FEB 1945 Application for N. S. I.

RECD COURSE OF INSTN [illegible]

4 APR 1945

Date Transferred .....

TRANSFERRED FOR TREATMENT

To .....

USNH, [illegible], ILL.

N.R.M. [illegible], Commanding Officer

Signature and Rank of Commanding Officer

Date Received Aboard: 4-4-45

USNH, GT. LKS., Ill.

(Ship or Station)

USNTC, GT. LKS., Ill.

N.A. [illegible]

Patient Personnel Officer

Signature and Rank of Commanding Officer

(8)

PROFESSIONAL QUALIFICATIONS, CONDUCT, AND MARKS

Date	Rate	Proficiency in rating	Seamanship	Mechanical ability	Ability as leader of men	Special Qualifications or Special Detail	Conduct	Initials of Executive Officer
8 APR 1945	AS V6 SV					TRANSFERRED FOR TREATMENT	4.0	

Final cruise on Disch., Health Inspection, Bat., Dept. U.S. Navy Dept., 1939)

NTCGL—6-26-44—210M—B

Name PHILLIPS, Willard Hodge (Negro)
Last First Middle

910 83 06 Rate AS SV6 Class
Service No.

Date Reported Aboard: 4-4-45

U. S. Naval Hospital, Great Lakes, Ill.
Present Ship or Station

USNTC, GT. LKS., ILL.
Ship or Station Received From

Admitted to Hospital
for Treatment

6/8/45 ...Disch. this date from the USN Hosp., Gt. Lks., Ill., to from the USN .R. with an .HONC.. Disch. NAVPERS 553 NoC- , in acc. with an Approved Medical Survey.
AUTH: BuPers Ltr Pers-66-ELM-P3-5 of 1-12-45

DISABILITY: IS .NOT..Misconduct
WAS .NOT...incurred in line of duty
LIKE .YES...

IS NOT recommended for Good Conduct Medal or for re-enlistment. Final ave..4.0.. Paid To Gt. Lks., Ill. to .New.York..New.York.... Has been notified to report to his draft board immediately upon discharge. Certified to Must. Out Pay, more ////// than sixty (60) days. Has not served over-seas since 7 December 1941.

(Mrs. I. W. SILLIMAN (HC) USN.
Asst. (2025(2) NR)

I certify that I have received my Honorable Service Button this date.

Date Transferred Willard Hodge Phillips
Signature

To

Signature and Rank of Officer Authorized to Sign

Date Received Aboard

(New Ship or Station)

(Last Ship or Station)

Signature and Rank of Officer Authorized to Sign

(10) ORIGINAL

12816 O. Order No. _____

910 83 06 PHILLIPS, Willard Hodges
(SERVICE NUMBER) (SURNAME) (FIRST NAME) (MIDDLE NAME)

AS SV (RATING) USN ☐ RET ☐ USNR ☒ V6 (CLASS) USN (I) ☐

U.S.NAVAL HOSPITAL, GREAT LAKES, ILL.
(SHIP OR STATION)

Enlisted on 2-14-45 (DATE) and is this date. 6-8-45 (DATE)

1. Discharged with XX UNDER HONORABLE CONDITIONS (CHARACTER OF AND REASON FOR DISCHARGE)

2 X Transferred to Fleet Reserve X (CLASS) X (at expiration of enlistment ☐)
X
(at other than expiration of enlistment ☐) and (is ☐)(is NOT ☐) immediately released X from active duty.

3. Released from active duty ☐

Completed X (NUMBER) years service on X (DATE)

If enlistment NOT extended, or extended only 1 year, net time served on enlistment and extension if any _____ (YRS.) _____ (MOS.) _____ (DAYS)

If enlistment extended 1 or more years, net time served on extension only. X _____ (YRS.) _____ (MOS.) _____ (DAYS)

Time (was ☐) (X was NOT ☐) X lost during this enlistment or extension because of AWOL, AOL, or NPDI.

Permission (was ☐) (was NOT ☐) granted to make up time lost.

Other Service (Act 6-16-42) X X _____ (YRS.) _____ (MOS.) _____ (DAYS)

Net Service completed on date of last discharge X _____ (YRS.) _____ (MOS.) _____ (DAYS)

Naval Service to include date of last discharge. XX _____ (YRS.) _____ (MOS.) _____ (DAYS)

Medals Awarded

Accepted for enlistment at ☐ Inducted at ☐

Ordered to Active duty from ☒ NEW YORK, N. Y. (PLACE)

Discharged or transferred and ~~to~~ Reserve at USNH, GREAT LAKES, ILL. (PLACE)

The above named individual (is ☐) (is NOT ☒) recommended for reenlistment.

[redacted]

Payment of Discharge Gratuity
(is ☐) (is NOT ☐) directed.

Due at Discharge $ _____
Personal Funds $ _____
Gratuity Credited $ _____

[redacted]

SUMMARY OF SERVICE

Vessel or Station	From—	To—	Rate
NRS, NEW YORK, N.Y.	2-14-45	2-16-45	AS SV WR DEM
USNTC, GREAT LAKES, ILL.	2-17-45	4-4-45	AS
USNH, GREAT LAKES, ILL.	4-4-45	6-8-45	AS, SV WR DEM

Permanent address after discharge 270 Manhattan Ave., New York City, New York

Final average in all marks upon discharge 4.0

M. A. SKVERSON, PHARM., USN
(SIGNATURE AND RANK OF COMMANDING OFFICER)
By direction of (Lt. 2025 (2) M
of NO

Defendant's Exhibit C

APPLICATION FOR JOB

(See opposite ☛)

APPLICATION

ANSWER ALL QUESTIONS USING "NONE" WHERE NECESSARY. DO NOT LEAVE BLANKS OR DRAW LINES TO INDICATE "NONE"

Your full name	Age	Name of wife or husband
WILLARD HODGE PHILLIPS	42	MYNITA

Present residence address	How long at address	Home phone
38 GARFIELD PLACE HEMPSTEAD, N.Y.	9 MOS.	IV.9-5603

Previous address	How long at this address
74 PROSPECT ST. ROOSEVELT	16 YRS.

Employed by: (if self, give firm name and kind of business)	Business address
DECAST BLDG. SEOTANE INC.	NASSAU TERMINAL RD. NEW HYDE P

Salary or income	Position or title	No. of years with firm	Business phone (give Ext. No.)
94.00 per WK.	LABORER	2 YRS 3 MOS.	FL.7-8702

Previous employer (if less than 3 years on present job)	Address	No. of years there
VERMONT MAN. CORP.	CHERRY VALLEY TURN. RD. W. HEMP	3 MOS.

Other income	Source of other income	Year and make of auto owned
NONE per		1955 PLYMOUTH

Do you own your home?	In whose name is the title?	Total of mtges.? $	Are taxes and mtge. paymts. up to date?
NO			

If you rent: Landlord's name	Address	Tel. No.	Rent:
MRS. CLARA WATSON	38 GARFIELD PL. HEMP	IV.9-5503	$70.00 per mo.

Name of nearest relative not living with you	Address	Relationship
ALICE WATKINS	74 PROSPECT ST. ROOSEVELT	COUSIN

Checking account (give branch)	Savings account (give branch)	Acct. No.
	MEADOWBROOK NAT. BANK W. HEMP	25713

Amount of life insurance carried $	No. of dependent children	Have you ever been bankrupt?	Have you ever been sued?
NONE	2	NO	NO

	Have you borrowed from any bank?	Are you an endorser for others?
[redacted]	NO	NO

Give the following debts and no others: If none, state none

To Whom Owed and Address	Nature of Debt	Amount Due	Monthly Payt.
MAC 310AK ST. PATCHOGUE N.Y.	AUTO.	842.00	47.11
(See reverse if additional space required)			
FRN. ELEC. CREDIT CORP. LINDENHURST	TV	183.85	36.77

TRADE REFERENCES

HOME	Address
	Address

-OVER-

MISCELLANEOUS

See C

What hours can you devote part time? AFTERNOONS AFTER 5 PM + SAT — SUN,

What do you seek to earn part time? $40.00 TO $60.00 PER WK.

If offered a franchise opportunity with this Company, would you consider it? YES

Signature Willard H. Phillips

Checked by _____ Appt. _____

Finance

OWE MEADOWBROOK BANK $64.00 @ 60.00 P/mo
FOR RECORD PLAYER.

1492

Stipulation as to Exhibits

COURT OF APPEALS

STATE OF NEW YORK

———o———

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

1493 WILLARD H. PHILLIPS,
Defendant-Appellant.

———o———

IT IS HEREBY STIPULATED, CONSENTED AND AGREED by and between the attorneys for the respective parties hereto that the printing or reproduction in the Record on Appeal of the following exhibits, which were received in evidence in the trial of this action, be and the same hereby is waived:

PEOPLE'S EXHIBITS

1494

No.	Description
3	Jumper
4	Blouse
5	Sweater
6	Panties
7	Purse
8	Belt
12	White Cap
13	Jacket

1495

17	Car window (ventilator)
18	Photo of fingerprint on window
19	Photo of fingerprint of Sunday Graham
21	Shorts
22	T Shirt
25	Peanut Shells
26	Peanut Shells

DEFENDANT'S EXHIBIT

1496

No.	Description
A	Land Map

IT IS FURTHER STIPULATED AND AGREED that the originals of the aforesaid exhibits may be produced, referred to in argument and submitted to the Court of Appeals upon the argument of the appeal herein with the same force and effect as if such exhibits were reproduced in full in the said printed Record on Appeal.

1497

Dated: Mineola, New York,
January , 1959.

MANUEL W. LEVINE
District Attorney, Nassau County
By HENRY P. DeVINE

HENRY W. SCHOBER
Attorney for Defendant-Appellant.

1498

Affidavit of No Opinion

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

HENRY P. DEVINE, being duly sworn, deposes and says:

That I am an Assistant District Attorney of the County of Nassau, State of New York, and I am familiar with all of the proceedings had in this action, and that no opinion or other memorandum
1499 has been rendered by the Court in this case.

HENRY P. DEVINE.

Sworn to before me this
day of January, 1959.

LOUISE M. DEMAR
Notary Public, State of New York
No. 30-5977400
Qualified in Nassau County
Term Expires March 30, 1960

1500

1501

Certificate of County Clerk

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

I, ERNEST F. FRANCKE, Clerk of the County of Nassau, and of the Courts of Record of said County, do hereby certify that I have compared the foregoing Notice of Appeal, Indictment, Judgment Roll, Plea of Not Guilty, Judgment of Conviction, Sentence and Pedigree in the case of People of the State of New York against Willard H. Phillips as the same appear on file in the 1502
Clerk's Office of said County, and that the annexed record on appeal is a true and correct copy thereof and of the whole of said originals.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said County and Court at Mineola, New York, on the day of January, 1959.

ERNEST F. FRANCKE,
Clerk of the County of Nassau.

1503

In Court of Appeals, State of New York 1504

Present, Hon. ALBERT CONWAY, CHIEF JUDGE, *presiding.*

MOTION No. 565

THE PEOPLE &c., RESPONDENT

vs.

WILLARD H. PHILLIPS, APPELLANT

Order granting motion for assignment of counsel

November 13, 1958

A motion having heretofore been made herein upon the part of the appellant for assignment of counsel and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, That the said motion be and the same hereby is granted and Henry W. Schober, Esq., of 150 Old Country Road, Mineola, New York, and Frank A. Fritz, Jr., Esq., of 120 Broadway, New York City, assigned as counsel to the defendant on the appeal herein.

A copy:

[SEAL] GEARON KIMBALL,
Deputy Clerk.
MAY 27, 1959.

In Court of Appeals, State of New York

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of May in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

Witness:

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.
RAYMOND J. CANNON,
Clerk.

Remittitur: May 14, 1959.

No. 10

THE PEOPLE &C., RESPONDENT

vs.

WILLARD H. PHILLIPS, APPELLANT

Be it Remembered, That on the 10th day of January in the year of our Lord one thousand nine hundred and fifty-nine, Willard H. Phillips, the appellant—in this action, came here unto the Court of Appeals, by Meyer F. Goodman and John H. Benoit, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of conviction of the County Court, Nassau County.

And The People of The State of New York, the respondent—in said action, afterward appeared in said Court of Appeals by Manuel W. Levine, District Attorney.

Which said Notice of Appeal and the return [illegible] filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Messrs. Henry W. Schober and Frank A. Fritz, Jr., of counsel for the appellant, and by Mr. Henry P. DeVine, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of conviction of the County Court, Nassau County, appealed from in this action, be and is hereby in all things Affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said ..... County ..... Court.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things Affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the prem-

ises, are by the said Court of Appeals remitted into the County Court, Nassau County, before the Judges thereof, according to the form of the statute in such case made and provided.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, May 14, 1959.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL] RAYMOND J. CANNON,
Clerk.

In Court of Appeals, State of New York

Present Hon. Albert Conway, Chief Judge, presiding.

MOTION No. 350

THE PEOPLE &C., RESPONDENT
vs.
WILLARD H. PHILLIPS, APPELLANT

Amended remittitur

June 25, 1959

A motion for reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, That the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, That the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested

and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, as follows: Appellant contended that his alleged confessions were not voluntarily given; that they were coerced; that they were submitted to the jury without proper instructions; that he was detained for an unreasonable time without arraignment, during which time the alleged confessions were taken, and that such actions constituted denial of due process of law under the Fourteenth Amendment. The Court of Appeals held that appellant was not denied due process under the Fourteenth Amendment.

And the County Court, Nassau County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy:

[SEAL] GEARON KIMBALL,
Deputy Clerk.

[Clerk's Certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 269 Misc., October Term, 1959

WILLARD H. PHILLIPS, PETITIONER

vs.

NEW YORK

On petition of writ of Certiorari to the Court of Appeals of the State of New York.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari

October 26, 1959

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for

writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the question of the admissibility of the confession. The case is transferred to the appellate docket as No. 497.

And it is further ordered, That the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1960

FILED SUPT.

JAN 29 1960

JAMES R. BROWNING, C

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 497

WILLARD H. PHILLIPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

ANTHONY T. ANTINOZZI
Counsel for Petitioner
120 Broadway
New York 5, New York
Telephone: REctor 2-2000

Of Counsel:

HENRY W. SCHOBER
150 Old Country Road
Mineola, New York

FRANK A. FRITZ, JR.
120 Broadway
New York 5, New York

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UNITED STATES CONSTITUTION:

Fourteenth Amendment, Sec. 1 2

U. S. STATUTES:

28 U.S.C. 1257(3) 2

MISCELLANEOUS:

2 Wigmore on Evidence, 3rd Ed., Sec. 284, *et seq.* 11

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 497

WILLARD H. PHILLIPS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

Opinion Below

The decision of the Court of Appeals of the State of New York affirming petitioner's conviction of murder in the first degree is reported at 6 N.Y. 2d 788, Advance Sheet #182, issued July 22, 1959; 188 N.Y.S. 2d 184 (R. pp. 504-505). No opinion was rendered by the Court of Appeals upon its decision.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1959 (R. pp. 504-505). On June 25, 1959, that Court

denied an application for reargument, without opinion, but amended the remittitur by reciting that questions under the Constitution of the United States had been necessarily considered in decreeing affirmance (R. pp. 505-506). Such denial of reargument and amendment of remittitur are reported at 6 N.Y. 2d 882 and 6 N.Y. 2d 881, respectively, both appearing in Advance Sheet #185, issued August 12, 1959; 188 N.Y.S. 2d 1001. Petition for writ of certiorari was filed August 24, 1959, and was granted October 26, 1959. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

Constitutional Provision Involved

The Constitution, Fourteenth Amendment, Section 1, provides:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

Question Presented

Whether the use of confessions, not freely or voluntarily given but admittedly "exacted" from petitioner after a lengthy inquisition following his protestations of innocence, amounted to a denial of due process.

Statement

Petitioner was adjudged guilty of felony-murder after trial by jury in the Nassau County Court. The jury did not recommend leniency and the death sentence was imposed. The pertinent facts are as follows:

On May 12, 1958, Sunday Graham, 8 years of age, failed to return from school to her home at Hempstead, Long

Island, New York (91-94, 105, 179, 185).* A missing persons alarm was issued and Detective Rofheart of the Nassau County Police thereafter interviewed Sunday's stepmother and, on the morning of May 13th, interviewed her classmates (231-233). The stepmother, who was a former wife and then paramour of Phillips, testified that shortly prior to May 12th she had told him to get out of her life. He replied that he would not get out "alone" and "would get even" (111-116). A classmate testified that on May 12th she had seen Sunday enter an auto driven by a negro male wearing a white cap and tan jacket (182-187).

At about 11 A.M., May 13th, and as the evident result of the aforesaid interviews, Rofheart called on Phillips at his Hempstead home, questioned him about his activities the previous day and searched his apartment (233-238, 297). Phillips, a 42-year-old unemployed negro with a record of morals offenses in Nassau County (704-711), owned an auto and clothing similar to those observed by Sunday's schoolmate (26, 188-191; Exhs. 11-13, pp. 444-446).

Phillips spent the next 23 hours in police custody without being arraigned. He steadfastly maintained innocence for over 18 hours, confessing for the first time shortly after 5:00 A.M., May 14, 1958. During those 18 hours he was persistently questioned, had no food or drink and was without friendly advice or legal counsel. He was subjected to humiliating treatment by the police, confronted by the victim's stepmother and uncle, and was accorded no opportunity to lie down and sleep although he had risen at 6:15 A.M. on May 13th, was sleepy, and dozed occasionally while seated in a chair.

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* Unless otherwise indicated, numbers in parentheses refer to folios of printed record on appeal to New York State Court of Appeals.

The details of Phillips' detention and interrogation follow:

After the initial questioning at his home by Detective Rofheart, Phillips was brought to a Detective Squad Office in Williston Park, arriving there at about 1:15 P.M., May 13th (238, 247). Rofheart questioned him for about an hour and a non-incriminatory statement was transcribed and signed at about 3:00 P.M. (255, 258, 291-292; Exh. 14, pp. 447-449). Nevertheless, Phillips was detained and Rofheart "talked to him further" (258-259).

At about 4:00 P.M., a report was received of the discovery of the violated body of a young negro girl in Garden City (258-259). Rofheart, Detective Diggs, Sergeant Owens and Lieutenant Curran then resumed the questioning which went on "not continually but on and off" until 6:30 P.M. (258, 302-307, 333-334).

Rofheart conceded that upon learning of the discovery of the body there was reason to believe Phillips had committed the crime and that, although there was enough proof to arraign him, no effort was made to locate a magistrate (339-345, 348, 599). Rofheart testified that he "kept" Phillips in custody in order to "exact" a confession (293, 342-343, 346). Detective Stark of the Homicide Squad, who arrived at the Williston Park office at about 6:30 P.M., also had reason to believe, upon learning of the discovery of the body, that Phillips may have murdered Sunday Graham (587).

Inspector Pribyl and Dr. Lukash, who arrived shortly after Stark, sought permission to subject Phillips to certain tests—to wash his penis, obtain fingernail scrapings and examine his clothing—but he refused (259-261, 462-463). Phillips was hesitant, desired advice, and questioned the right of the police to make such tests (405, 410, 462-

463, 555). Pribyl, who felt he "could gain the confidence of the defendant alone, because he knew me" (513), told the others to leave so he could speak to him privately (404, 461-464, 555, 601). This short private conference secured its desired result—when Stark, Rofheart and Dr. Lukash were invited to return, Phillips, after seeing Pribyl drink some of the solution to be used, submitted to the tests (466-468), which had negative results (469, 470). At some indeterminate time, he was given clothing in place of that which had been taken from him (261).

After the completion of the tests, Stark and Rofheart continued to talk to Phillips (261-263, 318, 559). Commencing at 9 P.M., Captain Closs questioned him for forty-five minutes to an hour (264, 318). At 10 P.M., Rofheart, Stark and Captain Lada questioned him (263-265, 309, 320-321, 559). Stark had meanwhile spoken to the victim's stepmother and uncle, and brought each of them separately to Phillips. They conversed privately but were kept under observation (559-563). The questioning continued until about 2:30 the following morning. Before leaving defendant's presence at about 1 or 1:30 A.M., Rofheart spoke to him and Stark and Lieutenant Cummings then interrogated him until 2:30 A.M. (268, 564). Phillips continued his denial of complicity, his statement still being exculpatory (564).

Then, in the dead of night, Phillips was taken to police headquarters at Mineola, arriving there at about 3:00 A.M. (566). Detective Stark, Lieutenant Cummings, Captain Lada and Chief Pinnell there subjected him to further questioning but his story remained the same (566-567).

At all times prior to his confession after 5:00 A.M., May 14th, Phillips maintained his innocence. The stenographer who recorded his first confession was alerted by

the prosecuting attorney at 11:00 P.M., May 13th, but was not summoned to police headquarters until 4:15 A.M., May 14th (538-539). Likewise, the prosecuting attorney, though already present at headquarters when Phillips arrived there at 3:00 A.M., did not participate in the continuing interrogation until after 5:00 A.M. when he came into Phillips' presence for the first time (568-569, 609).

When questioned by the prosecuting attorney, Phillips first denied any complicity (1387-1429), but when falsely informed that the victim's blood was found on his clothes (1430)*, he remarked "I'm sunk", to which the prosecuting attorney replied "Well, we knew that before, * * * " (1437). Phillips then for the first time acknowledged the rape and murder of Sunday Graham. (Exh. 28, pp. 182, 462-487).

Another confession was obtained immediately thereafter by Stark (570; Exh. 29, pp. 191, 488).

Phillips was finally arraigned at 10:00 A.M. on May 14th (574). However, the inquisition did not then cease. After his arraignment, Phillips was driven about to various locations allegedly involved in the crime (574-577). He was brought to the police laboratory at about 11:30 A.M. where he identified certain portions of his clothing (474). Later, at about 1:00 P.M. that day, he was examined by the psychiatrist who gave rebuttal testimony for the People, including evidence of additional admissions of guilt (1006-1007, 1014).

Phillips testified that he had been "beaten around and forced to do different things"; that the constant interrogation "for almost two days" had left him in a state

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* Blood stains were discovered on soiled underclothing found in defendant's room but it was never determined whether the blood was the victim's, whether it was human or whether defendant had worn that clothing on the day of the crime (473-479).

of shock—"almost in a state of brain-wash"; that he "couldn't have been in a reasonable state of mind in order to be able to reason an answer"; that he "had no alternative" and, when questioned by the prosecuting attorney, parroted back the versions given him by the detectives, that being the easiest way out (805-808).

The People not only failed to call each officer who interrogated Phillips but failed to call each officer who was alone with him. Phillips was twice left alone with and questioned by Detective Diggs, who did not testify (306-307). Inspector Pribyl, who was left alone with him prior to the performance of the tests (601), was not asked whether he had employed coercion. For a brief period at about 2:30 A.M., May 14th, he was left alone with Lieutenant Cummings who did not testify (564-565). A portion of Stark's testimony suggests that, for an undisclosed period, at Mineola Headquarters, Phillips may have been alone with other police officers who did not testify—of the four officers who interrogated Phillips at Mineola, Stark alone was called by the prosecutor to testify and indicated that the prosecuting attorney came into Phillips' presence for the first time at 5:10 A.M. May 14th, and that a portion of the time spent in Mineola between 3:00 A.M. and 5:10 A.M. was consumed while "we explained the case to Mr. Cahn" (the prosecuting attorney) (568-569, 610-613). Meanwhile, Phillips doubtlessly was in the custody of some other police officer or officers who were not called to testify.

Apart from the confessions to the prosecuting attorney and Detective Stark and the written non-incriminatory statement to Rofheart, no transcription or record was made of Phillips' detention and questioning (619).

Summary of Argument

Petitioner's confessions resulted from intensive questioning and mistreatment during long incommunicado detention which was for the admitted purpose of exacting a confession and extended far beyond the time when the authorities were satisfied of petitioner's guilt and of their ability to arraign and charge him with the capital offense. The use of confessions secured by those coercive methods deprived petitioner of his constitutional right to due process.

ARGUMENT

I.

Petitioner Was Denied Due Process by the Improper Admission of Involuntary Confessions Into Evidence.

Due process prohibits the use of a confession which is not "the expression of free choice" but is, instead, the product of physical or mental pressure or the "suction process of interrogation". (*Spano* v. *New York,* 360 U.S. 315; *Payne* v. *Arkansas,* 356 U.S. 560, 562; *Fikes* v. *Alabama,* 352 U.S. 191; *Leyra* v. *Denno,* 347 U.S. 556; *Watts* v. *Indiana,* 338 U.S. 49, 53; *Malinski* v. *New York,* 324 U.S. 401; *Haley* v. *Ohio,* 332 U.S. 596; *Stroble* v. *California,* 343 U.S. 181; *Ashcraft* v. *Tennessee,* 322 U.S. 143; *Lyons* v. *Oklahoma,* 322 U.S. 596; *Lisenba* v. *California,* 314 U.S. 219).

If an independent review by this Court of the undisputed facts discloses that Phillips' confessions were not voluntarily given, the judgment of conviction must be reversed. (*Payne* v. *Arkansas,* 356 U.S. 560, 562; *Malinski* v. *New York,* 324 U.S. 401, 404). The presence of other independent evidence sufficient to sustain the conviction is irrele-

vant. (*Spano* v. *New York,* 360 U.S. 315, 324; *Malinski* v. *New York,* 324 U.S. 401, 404).

The following facts are uncontroverted: Phillips, a negro ex-convict, was in police custody for 18 hours before confessing and for 23 hours before being arraigned. He was questioned for substantial periods by numerous persons, was tired, and was without sleep, food, water or friendly counsel. He was stripped of his clothing and subjected to a humiliating examination of his private parts. He was confronted by the victim's step-mother. In the early morning hours and after more than 14 hours during which he steadfastly maintained innocence, he was transferred from one police office to another for further questioning. The inquisition continued after the arraignment —Phillips was brought to various locations allegedly involved in the crime; he was taken to the police laboratory; he was interviewed by a psychiatrist who obtained an additional confession 26 hours after he was taken into custody. During those 26 hours Phillips had no opportunity whatever for sleep, with the possible exception of some unspecified length of time spent in a detention pen between the hours of 7:00 A.M. and 10:00 A.M., May 14th, subsequent to his first and second confessions (573-574).

The record does not explain why Phillips was brought from Hempstead, beyond Mineola, to the 3rd Precinct in Williston Park, rather than to Mineola police headquarters where he ultimately confessed and was arraigned. Neither does the record explain why the prosecuting attorney did not participate in the questioning by police even though present in the same building (609-611) or why the stenographer who transcribed the first confession was evidently not summoned to police headquarters until long after he had been alerted (538-540).

Just prior to confessing, Phillips was deceptively informed that Sunday's blood had been found on his clothing (1430), and it was implied that he would be "sunk" if he did not confess (1437). Statements in his confession indicate that he was overborne by long questioning and had succumbed to and adopted the suggestions of his inquisitors. For example (1461, 1450):

> "Q. Well, that was to make sure she was dead, wasn't it, Mr. Phillips? A. That reasoning on your part is as good as anything I could give. I don't recall having any reason whatsoever. It possibly is true."
>
> * * * * * * *
>
> "Q. After you went down Greenwich Street you got excited, did you? A. Yes, I must have. So much of it is blank. I can't fill it in. I can't recall the whole thing step by step. Some things I can remember and some is like a dream. Very hazy."

Many of Phillips' answers indicate that his mind was unclear and that he was merely relating what he "guessed" or "thought" he had done, what "probably" or "must have" occurred (1438-1441; 1443, 1445, 1450, 1451, 1459-1461). Phillips testified that he had been "beaten around and forced to do different things"; that the constant and prolonged interrogation for almost two days had left him in a state of shock; that he "was almost in a state of brainwash" and "couldn't have been in a reasonable state of mind in order to be able to reason an answer"; that he "had no alternative" and, when questioned by the District Attorney, he repeated the versions of the crime given him by the detectives, that being the "easiest way" out (805-808).

Although Detectives Rofheart and Stark denied that Phillips had been threatened or subjected to coercion, those denials are inadequate since he was questioned by and left alone with police officers who did not testify. The failure of the prosecution to produce those witnesses, who were clearly within its control, gives rise to the inference that their testimony would have been favorable to Phillips. (See e.g., *The New York,* 175 U.S. 187, 204-205; *Kirby* v. *Tallmadge,* 160 U.S. 379, 383; 2 Wigmore on Evidence, 3d Ed. Sec. 284 *et seq.*). If such an inference is not drawn, a situation is created where, for all practical purposes, the defendant—whose long detention was witnessed only by police and other agents of The People—is saddled with the burden of proof on the issue of voluntariness although such burden rightfully rests upon the prosecution. (See *Speiser* v. *Randall,* 357 U.S. 513, 523-524).

It is only proper in considering Phillips' claim of mistreatment by the police that account be taken of the manner in which that claim was presented on the trial by his court-assigned counsel. Defense counsel sought to exclude the confessions on the ground that they were coerced but made no attempt to elicit any evidence on that issue from Phillips. The latter's testimony in that respect, i.e. that he had been "beaten around" and "brainwashed", etc., was given while under cross-examination by the prosecuting attorney and was, perforce, of a general character (805-808). However, that testimony, general though it was, when considered along with the other circumstances surrounding petitioner's extended detention and interrogation, fully demonstrates the impact upon him of the coercive measures employed by the authorities.

The situation in which Phillips found himself at the hands of the police was certainly no less unconscionable or inherently coercive than those involved in *Malinski* v.

New York, 324 U. S. 401, *Spano* v. *New York,* 360 U. S. 315, *U. S. ex rel. Caminito* v. *Murphy* (2d Cir. 1955) 222 F.2d 698, cert. denied 350 U.S. 896; and *U.S. ex rel. Wade* v. *Jackson* (2 Cir. 1958) 256 F.2d 7, cert. denied 357 U.S. 908, where confessions were held inadmissible as a matter of law.

In the *Malinski* case the accused was questioned occasionally for ten hours before giving his first confession which was held to be involuntary. Evidence of violence, being disputed, was ignored. The accused was permitted to see no one except one friend. He had been stripped and was naked for a few hours, and was partially clothed for several hours. According to the District Attorney, this was done to "humiliate" him and he was not "hard to break". Here are analogous facts—the humiliating stripping of Phillips, the washing of his privates and Detective Rofheart's admission that he was detained so that the police could "exact" a confession.

Several aspects of the *Caminito* and *Wade* cases, *supra,* are present here, viz., the use of deceptive tactics to extract a confession, a claim by the accused that words were put in his mouth, an unexplained failure of the District Attorney to participate in questioning although present in the same building, and the failure to explain the transportation of the accused for questioning to a point other than the place of arraignment. There are additional similarities: lack of food and drink (although offered), failure of the accused to speak clearly while under questioning, and unsatisfactory denials by the police of the use of violence.

In the *Spano* case, after about only eight hours of questioning by various police officers, the accused confessed notwithstanding his initial refusals to answer based on advice of his counsel. A police officer, as did Inspector

Pribyl herein, sought to take advantage of his acquaintanceship with the accused.

True, the interrogation of Spano followed his indictment, but, as is clear from the opinion of this Court, that fact was significant because it demonstrated "the undeviating intent of the officers to extract a confession * * * ". (360 U.S. at p. 324). That very same intent is demonstrated in this case by the questioning of Phillips for approximately twelve hours after the police were seemingly satisfied that he was the guilty party and, according to their own admission, had enough proof to warrant arraignment. Detective Rotheart freely conceded that Phillips was retained in custody so as to "exact" a confession. Numerous facts show that the police were satisfied that they had "their man", already had proof sufficient to arraign and indict Phillips, and believed that a confession was forthcoming provided they persevered in their "softening-up" process:

> Phillips, with his past record* and relationship with Sunday and her stepmother, was a "natural suspect".
>
> According to the stepmother's testimony, Phillips had a motive. Shortly prior to Sunday's disappearance, the stepmother sought to terminate her illicit affair with Phillips and told him to "get out" of her life. Phillips threatened that he would not get out "alone".
>
> On the day of her disappearance, Sunday was seen by a classmate entering an automobile similar to that owned by Phillips. The driver was a negro wearing a white cap and tan jacket. Phillips, a negro, owned a white cap and tan jacket.

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* Sex offenses against minor females (26, 704-711).

. .tive Rofheart abruptly called upon and apprehended Phillips after having interviewed Sunday's stepmother and classmates.

Peanut shells were found in the victim's hair and also on the rear floor of Phillips' automobile (486, 492).

Phillips was first taken by Detective Rofheart from Hempstead, not to Mineola where he finally confessed and was arraigned, but beyond Mineola to the Third Precinct in Williston Park.

The Police persisted in their questioning notwithstanding Phillips' steadfast denial of guilt and seemingly plausible alibi.

Although the police believed that they had sufficient proof to warrant arraignment, they made no effort to ascertain whether or not a magistrate was available.

Phillips, while still claiming innocence, was transported to Mineola in the early morning and confessed shortly thereafter.

The marathon interrogation was conducted by changing personnel—Phillips was questioned by persons of progressively higher rank, first by detectives, a sergeant and a lieutenant, subsequently by inspectors and captains, then by Chief Pinnell and ultimately by the Assistant District Attorney who procured the first confession and conducted the trial for the prosecution.

The stenographer who transcribed Phillips' first confession was alerted several hours before Phillips confessed and at a time when Phillips was maintaining innocence. The stenographer was not actually summoned to police headquarters until shortly before Phillips agreed to confess.

The record contains no explanation of the failure of the prosecuting attorney, who was present in the

same building, to participate in the questioning until shortly before Phillips confessed.

When Phillips finally agreed to confess, the prosecuting attorney stated that he had previously known of Phillips' guilt.

The interrogation of Phillips continued after his arraignment.

There is nothing in the record to indicate that anyone other than Phillips was ever under suspicion.

All these matters indicate that the police were satisfied with Phillips' guilt and that a confession, which would simplify the prosecution, was forthcoming provided he was worn down. Thus it is clear that the interrogation continued not because, in the words of the *Spano* case, the police were merely "trying to solve a crime or absolve a suspect", but rather because they "were concerned primarily with securing a statement from defendant on which they could convict him", and because of their "undeviating intent * * * to extract a confession". (360 U.S. 315, 323-324).

Since, as aforesaid, the presence of other evidence which might serve as a sufficient basis for conviction is irrelevant, we have not treated other evidence such as Phillips' own testimony when he took the stand only after the unsuccessful efforts of defense counsel to exclude the confessions. However, in this connection it is well to note that Phillips' testimony was that he was in a temporary "blackout" when the rape and murder were committed. This and other testimony of the petitioner, coupled with portions of the testimony given by the defense psychiatrist, might well have brought about a different verdict if the confessions had not been admitted into evidence. In the absence of the confessions, the jurors may well have been dissatisfied with the proof of guilt and, in any event,

if convinced of petitioner's guilt, may have recommended clemency as part of their verdict.

In considering the effect of the detention and interrogation upon Phillips' will and ability to withstand the coercive and overbearing pressures exerted upon him, it should be noted that he definitely had a mental or personality defect even though he was a high school graduate with better than average intelligence quotient (833-837, 1002).

The circumstances under which the confessions were procured convincingly demonstrate that they were the product not of Phillips' free choice but of overbearing treatment and the suction process of interrogation.

The trial court erred not only in submitting to the jury confessions inadmissible as a matter of constitutional law, but compounded that error by the improper manner in which those confessions were submitted. As appears from *Stein* v. *New York*, 346 U.S. 156, where there is conflicting evidence on the issue of voluntariness that issue is determined not by the trial judge, but rather by the jury, and the confessions are admitted only *tentatively* or *provisionally* by their submission to the jury with binding instructions that they be ignored if found involuntary. The trial court gave no such binding instructions here. In effect the charge to the jury permitted the consideration of the confessions merely if they were found truthful*. Thus they were neither provisionally nor tentatively received in keeping with the *Stein* case. As a result, Phillips was actually convicted without any finding by either judge or jury that his confessions were, *in fact*, voluntarily given.

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* The charge permitted the jury to rely on the confessions merely if truthful (1230). While the court stated that the confessions must be voluntary, it defined a voluntary confession as

It is submitted that the use made of Phillips' confessions "deprived him of that fundamental fairness essential to the very concept of justice, and hence, denied him due process of law, guaranteed by the Fourteenth Amendment." (*Payne* v. *Arkansas*, 356 U.S. 560, 567).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:

HENRY W. SCHOBER
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a truthful confession, i.e., as a confession "not produced by fear or under such circumstances *as to lead one to believe it was not the truth*" (1234) and refused to charge that the jury should consider whether petitioner was detained for the purpose of extracting a confession (1279-1281). The overall effect of the charge was that the confessions, if true, were voluntary and could be considered as proof of guilt.

To be argued by
JOSEPH I. HENEGHAN

Supreme Court of the United States

October Term, 1959

Office-Supreme Court, U.S.
FILED
FEB 29 1960
JAMES R. BROWNING, Clerk

No. 497

WILLARD H. PHILLIPS,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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No. 497

WILLARD H. PHILLIPS,

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THE PEOPLE OF THE STATE OF NEW YORK,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

Opinion Below

The decision of the Court of Appeals of the State of New York unanimously affirming the judgment of conviction entered against the petitioner in the County Court of Nassau County on October 17, 1958 for the crime of Murder in the First Degree is reported *sub nom. People* v. *Phillips,* at 6 N. Y. 2d 788. No opinion was rendered by the Court of Appeals upon its decision.

Jurisdiction

The judgment of the Court of Appeals was entered on May 14, 1959 (R. pp. 504-505). On June 25, 1959 that Court unanimously denied an application for reargument, without opinion, but amended the remittitur by reciting that, in

affirming the judgment of conviction, the Court had necessarily passed upon questions under the Constitution of the United States as to whether the petitioner's confessions were voluntarily given and whether the taking of such confessions constituted denial of due process of law under the Fourteenth Amendment (R. pp. 505-506). Such denial of reargument and amendment of remittitur are reported at 6 N. Y. 2d 882 and 6 N. Y. 2d 881, respectively. Petition for writ of certiorari was filed on August 24, 1959 and was granted on October 26, 1959. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257, subd. 3, and 28 U. S. C. Section 2106.

Question Presented

Whether the rights of petitioner, under the Fourteenth Amendment to the United States Constitution, were violated by the admission into evidence, at his trial, of confessions voluntarily given by him during prearraignment interrogation.

Constitutional Provisions and Statutes Involved

United States Constitution Amendment XIV:

Section 1.

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Constitution Article I, Section 6:

> "No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, * * *."
>
> "No person shall be deprived of life, liberty or property without due process of law."

New York Code Criminal Procedure Section 251:

> "The grand jury ought to find an indictment, when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

New York Code Criminal Procedure Section 395:

> "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Statement

Petitioner was found guilty, after trial by jury, of the crime of felony-murder. As the jury did not recommend leniency, the petitioner was sentenced to death. The following are the facts upon which the conviction and sentence are founded:

The Crime

Sunday Graham, an 8 year old Negro girl, left her home in Hempstead, New York at about 8:45 A. M. on Monday morning, May 12, 1958, to attend Our Lady of Loretto Roman Catholic school (91, 93).* Her foster mother, Mrs. Mynita Graham, visited Sunday at the school that day about 2:00 P. M. (89, 103). She never again saw her child (105).

When Sunday failed to arrive home, after leaving school about 2:45 P. M. (178), Mrs. Graham retraced her

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* Unless otherwise indicated, numbers in parentheses refer to folios of printed record on appeal to New York State Court of Appeals.

daughter's route to the school, questioned one of the Sisters (108) and finally, at about 5:30 P. M., notified the Hempstead Police Department (108, 109, 171). They organized a search and, when this failed to locate Sunday, they sent, at about 10:15 P. M. that evening, a missing person alarm to the Nassau County Police Department (172-174).

Between 4:00 and 5:00 P. M. the following day, May 13, 1958, Sunday's body was discovered behind a warehouse in Garden City, a nearby community also in Nassau County (359-360, 365-366, 372, 374-375, 420, 458). A post-mortem examination of the child's body revealed that her hymen and vaginal tract were torn and lacerated as a result of having been raped (391-392, 486, 525). She had been smothered to death with her own underpants which had been forced tightly down her mouth and throat and her belt was found wrapped around her neck (388-389, 394-395).

The Petitioner

Willard H. Phillips, a Negro, was a 42 year old unemployed electronic repairman (27) at the time of the crime (26, 27, 669). He is a high school graduate (27, 678) with an above average intelligence quotient of 111 (920). After the first of his two marriages ended in an annulment, he married Mynita Graham, Sunday's foster mother (688). This second marriage terminated in a divorce in 1944 (691). In 1945, the petitioner was inducted into the U. S. Navy and received an honorable discharge after approximately four months' service.

In 1947 he was convicted, after trial, of stabbing and raping a 17 year old girl and was sentenced to 10 years imprisonment (705-708). He had never before confessed raping this girl and had, in fact, sworn innocence throughout his testimony upon his former trial (782-785). He was released on parole in 1952 (708), but two months later

he was recommitted to prison because he had molested a 5 year old girl (710-711). He also confessed to his psychiatrist that he had raped approximately twenty-five other women (861-862).

After his final release from prison in 1956 (711), Mrs. Graham again became his paramour (111, 148-149, 712). Four days before the murder Mrs. Graham terminated her relationship with the petitioner (111-114), and he threatened that he would "get even" with her (114, 116).

The Detention and Questioning of the Petitioner

Following receipt of the report of Sunday's disappearance, Detective Rofheart, from the Third Precinct of the Nassau County Police Department, obtained a description from her foster father, spoke with Mrs. Graham at her home and then began to search the area (231-233). The following morning, May 13, 1958, he, and another detective, interviewed Sunday's classmates at her school and then went to the petitioner's home in Hempstead (234-237). They found there a cap and jacket similar to those worn by the driver of the car that Sunday had been seen entering the previous afternoon (187-191, 237-238). Rofheart also learned that the petitioner's car was similar to the one observed by Sunday's classmate (188, 245).

The two detectives then asked the petitioner to come to the Third Precinct police station in Williston Park and the petitioner voluntarily accompanied them (238, 246, 253). They arrived at the precinct at about 1:15 P. M. (247, 284) and the petitioner was questioned only by Rofheart from about 1:30 P. M. to 2:30 P. M. (255). Rofheart typed up the petitioner's wholly exculpatory statement concerning his activities the previous day (251-255). About 3:00 P. M. the petitioner read and signed this statement (251, 255-257, 1339-1347).

About 4:00 P. M. the police were notified that the violated body of a young Negro girl had been found in Garden City (258). Rofheart then resumed questioning the petitioner "not continually but on and off" until about 6:30 P. M. (258). Lieutenant Curran, Sergeant Owens and Detective Diggs also spoke with the petitioner for short periods between 3:00 and 6:30 P. M. while other detectives went out to investigate the petitioner's statement (300-302, 306-307). At about 6:30 P. M. Detective Stark of the homicide squad arrived to take charge of the case and was briefed by Rofheart for approximately 30 minutes (260-261, 313-314, 553).

At about 5:00 P. M. the Nassau County Police were informed that the dead child was Sunday Graham (332). Until the time Sunday's body was discovered the police would neither have arrested the petitioner nor restrained him if he had wished to leave (329, 331). The discovery of the child's body altered the purpose of the investigation. No longer was a missing child sought—information to solve a murder was thereafter the object.

When the body was identified at 5:00 P. M., Detective Rofheart suspected the petitioner was responsible, but he did not believe the proof was sufficient to formally charge petitioner with any crime (291, 350-351). From this time on, however, petitioner would have been arrested if he had attempted to leave (341, 588) as the police felt that basis existed for further investigation in the form of laboratory tests and resolution of the discrepancies in the petitioner's statement (589-594).

Accordingly, shortly after 7:00 P. M., Dr. Leslie Lukash, the Nassau County Medical Examiner, and Inspector Pribyl, Supervisor of the Police Laboratory, came to the stationhouse (461, 555) in order to conduct the laboratory tests, i.e., washing of petitioner's penis with a sa'ine solution, examination of his clothing and the taking of fingernail scrapings (462). The petitioner was reluctant to con-

sent to these tests and he was told that he was under no obligation to submit to them (410-413). After Inspector Pribyl had demonstrated, by drinking the saline solution, that the tests were harmless, and had explained that, if the petitioner were innocent, he had nothing to fear from the tests, the petitioner gave his consent and the tests were performed. Subsequent analysis of the specimens showed there was neither sperm on his penis nor blood on his fingernails (469-470). No seminal staining was found on petitioner's underclothing (473), but unidentifiable blood stains were found (473, 475). The tests conducted by Dr. Lukash and Inspector Pribyl were concluded about 8:00 P. M. (558).

Detective Rofheart had asked the petitioner, at about 6:30 P. M., if he wanted something to eat (260-261, 302). Detective Stark, when he went out for supper at 8:00 P. M., also asked the petitioner if he wanted to eat (263). On both occasions the petitioner declined to have anything to eat (260, 263, 335). While Stark was at supper, the petitioner remained with Rofheart who did not question him (263).

Shortly after 9:00 P. M. Captain Closs arrived and he questioned the petitioner until approximately 10:00 P. M. (264). At about 10:30 P. M. Mrs. Graham came to the precinct, talked first with Stark and then spoke privately with the petitioner for about twenty minutes (266, 560-561). Stark again offered food to the petitioner but it was declined (561). Following this, Mrs. Graham's brother, Curtis Maddox, also spoke privately with the petitioner for approximately 30 minutes (267, 563). Rofheart left the precinct at about 1:30 A. M. (268) and Stark and Lieutenant Cummings questioned the petitioner for about an hour until 2:30 A. M. (564-565). They had first offered to bring food to the petitioner but he still refused it (564).

Shortly after 3:00 A. M. the petitioner, Stark and Lieutenant Cummings went to Nassau County Police Headquarters in Mineola (566, 610). Upon arrival there the

Chief of Detectives, Stuyvesant Pinnell, sent out for sandwiches, but when the food was offered him the petitioner again declined it (567). Chief Pinnell, in the presence of Inspector Lada, Cummings and Stark, then questioned the petitioner for approximately an hour (567-568, 611). Another hour passed while the police reviewed the case with Assistant District Attorney William Cahn while Stark remained with, but did not question, the petitioner (568, 613).

The Confessions

Assistant District Attorney Cahn began to question the petitioner at 5:10 A. M. in the presence of Curran and another Assistant District Attorney (1385-1386). A stenographic record (1384-1461) of the entire conversation was made by a court reporter who came to police headquarters sometime after 4:15 A. M. (538, 542). At the outset the petitioner gave a detailed account of his activities on May 12, 1958, specifying the times and places of his travels throughout the day, his search for work, his purchase of a phonograph record and his conversation with Mrs. Graham when he volunteered to join in the search for Sunday (1396-1428). Examination of this portion of the statement reveals very clearly that the petitioner not only was not ready to confess—but was alert to avoid making any incriminating admission whatever (1391, 1394, 1414, 1421).

The petitioner was articulate and positive in all his answers—which hadn't changed since his statement to Detective Rofheart that afternoon (cf. 1339-1346). Not once did he refuse to answer, request any attorney or advice or complain of any kind of ill-treatment (1387-1430). Moreover, his recollection of a mass of detail was prompt and spontaneous. A reading of his answers (e. g. 1421) shows that he discussed the events of the previous day with complete confidence.

However, when he was asked what he had done after he picked Sunday up at her school, the petitioner gave no

answer (1430-1431). Instead, he asked to see Chief Pinnell, Inspector Lada, Sergeant Cummings and Detective Stark (1432). He stood up and shook hands with each one of the police officers as they entered the room (738, 1433-1434). While shaking hands with Inspector Lada the petitioner told him that he was now telling the truth and the Inspector assured him that he was doing the right thing (1435).

Once more, the petitioner was offered coffee which he again refused (570, 1435). The petitioner, who is Roman Catholic (27), blessed himself (1461) and then gave a full statement as to his raping and strangling the child (1437-1461). The first confession was completed at 6:00 A. M. (1461). Starting at 6:05 A. M. Detective Stark typed a further statement which the petitioner read and signed at 6:40 A. M.

After the petitioner had completed his statement to Detective Stark, he asked to see a Catholic priest; Father John Cochran came to police headquarters and conversed privately with the petitioner (573-574). The petitioner was then placed in detention at headquarters until he was arraigned in the Nassau County District Court at 10:00 A. M. (574). Following the arraignment, the police asked the petitioner to show them the various locations involved in the crime. The petitioner agreed and they drove to the locations where the petitioner had first waited for Sunday, where he had raped and killed her, and where he had disposed of her body (574-576). While at the scene where the body was found, the petitioner led the police to where he had thrown away Sunday's pocketbook (576-581).

Petitioner's Testimony Upon the Trial

In his direct testimony at the trial the petitioner reviewed the events of his life—with particular emphasis on his sexual activities (679-680, 719-723). He testified that

he had driven Sunday Graham from her school to an ice cream stand in Hempstead on the afternoon of May 12 (740-742). When Sunday began to "tease" the petitioner that her mother would not see him again (745-746), he drove her to a lonely spot near a golf course and threatened the child that, if she didn't tell him what her mother had said, he would play with her vagina (751-753). He knew that the child was "sensitive about even mentioning" her private parts but he wanted "to determine whether she was actually told the things she was telling me" (754).

He dragged her into the back seat of his car and began "playing with her" (754). The child resisted him, fought and screamed as he took her panties down (755). He testified that the next he remembered was that her body was between his legs and he was holding her belt, which was wrapped around her neck (755). He wiped the sperm discharge off her dress (756) and, when he saw that she was dead, he put the body on the back seat of the car (757-758).

He drove to Mineola to keep an appointment for a job application and arrived there about 5:00 P. M. (760-763). After filling out the application (764), he then disposed of the body, exchanged the phonograph record he had purchased the day before and went to dinner in a restaurant (766-769). His direct testimony concluded with his account of his telephoning Mrs. Graham and volunteering to join in the search for Sunday (770-771).

Not once during his entire direct testimony did the petitioner indicate that he had ever been threatened, struck, deceived, coerced, or forced, in any manner, to confess. He did not deny raping and strangling Sunday Graham nor did he repudiate his confessions. In fact, he confirmed that he had requested to shake hands with each of the police officers—and that he was questioned by the Assistant District Attorney for almost an hour—before he "broke down and confessed" (738-739).

During cross-examination the petitioner was asked to explain his testimony that he "had very little alternative as to what" he had stated in his confession (805). He answered that he was in a "state of shock * * * couldn't have been in a reasonable state of mind * * * after being beaten around and forced to do different things" (805). He also claimed that he "was almost in a state of brain-wash" after the police "had carried me through so much and had told me so much" (807). The petitioner denied that certain of the answers he had given in his first confession were true (796, 798, 799, 810), and he testified that he was unable to remember certain other answers he had given in his first confession (798, 801-803, 806, 812-813). He did admit, however, that he had kept Sunday's panties in her mouth "to stop her from screaming" (800). Finally, he was unable to remember—but he wouldn't deny—that he had raped and killed Sunday Graham (815).

Summary of A[illegible]

The petitioner, an experienced c[illegible]inal with above normal intelligence, well schooled in concealing his guilt, gave two entirely voluntary and truthful confessions while being questioned as a suspect in the course of an investigation into an unsolved murder. During the time he was questioned the petitioner was fairly treated, repeatedly offered food and was never coerced in any form. The confessions were not extracted by means of any brutality or duress but were motivated solely by the outpouring of a conscience burdened with guilt.

ARGUMENT

POINT ONE

As the petitioner's confessions were completely voluntary and truthful, they were properly admitted into evidence.

The petitioner, in urging this Court to reverse the judgment of conviction, claims that due process was denied him by the use of his confessions as they were not "the expression of free choice". In support of this contention the petitioner advances a number of statements concerning his confessions in an effort to compel belief that they were produced solely by "mistreatment", "coercion", and "deceptive information".

Answer to these contentions can best be found in analysis, in order, of those statements selected and utilized by the petitioner in support of his argument. As the facts in the record clearly demonstrate that the petitioner's confessions were freely and voluntarily given, the respondent will review the following principal assertions of the petitioner:

A.

That petitioner was "beaten around and forced to do different things".

While being pressed on cross-examination to explain his statement [as to why he didn't remember certain of the answers he gave in his first confession] the petitioner made one reference to "being beaten around and forced to do different things" (805). In his brief (pp. 6, 10, 11) the petitioner quotes this single phrase of testimony three times, although there is nothing in the record to show who beat him or even when or where it was supposed to have happened. Not only was this answer unresponsive, it does not constitute a fair import of his testimony.

Although, in opening to the jury, his trial counsel promised to demonstrate that the petitioner was "tortured * * * by at least 36 different officers of the Police Department" (86), not a single witness was called—not even the petitioner—to offer any proof in support of this remarkable statement.

In fact, the petitioner's counsel stated that he would take "about one week to demonstrate that [the transcript of petitioner's first confession] shouldn't go into evidence" (535). However, when the stenographer who had transcribed this confession testified that the petitioner was not ready to confess—and didn't confess—when first questioned by the Assistant District Attorney (541), counsel requested a recess to study the entire statement (542-543). Following this recess no evidence whatever was adduced to show that the petitioner had ever been struck, or beaten, or threatened. The confessions were admitted into evidence without any question being raised as to physical violence (544, 571). In his attack on the confessions, at the close of the prosecution's case, petitioner's trial counsel again made no mention of any physical violence but, instead, stressed the length of the interrogation and the "deception" practiced by the Assistant District Attorney (657-661).

In view of this state of the record, it can not reasonably be argued that beatings or threats were raised as any issue at the trial. Nor may any unfavorable inference as to this issue be drawn from the prosecution's failure to call all the police officers who questioned the petitioner as such witnesses were equally available to the petitioner, *United States* v. *Beekman*, 155 F. 2d 580 (2d Cir.), II Wigmore on Evidence (3d Ed.) § 288.

Detective Rofheart, who had the petitioner under close scrutiny continuously until 1:30 A. M. (298), and Detective Stark, who was present throughout the petitioner's questioning at police headquarters (611-612), both testified that no promises of leniency were made to the petitioner (219,

608, 615), that he was not threatened in any manner (319, 322, 327, 607), and that he was never struck (328, 607, 615, 617).

Moreover, the names of all police officers who had any connection with the investigation were well known to the petitioner and his trial counsel (302-312). Their testimony was available at all times to the petitioner if he wished. As no effort was made to adduce any such testimony, the conclusion is irresistable that no basis ever existed to support the petitioner's claim that he was threatened or beaten. Quite simply, the claim is incredible in the face of the record. Its rejection by the jury was entirely warranted.

B.

That petitioner "was stripped of his clothing and subjected to a humiliating examination of his private parts."

Petitioner seeks to equate the fact that his undercloth-ing was removed for laboratory examination with the circumstances in *Malinski* v. *New York,* 324 U. S. 401. In this effort he ignores the facts that he was immediately furnished fresh clothing and his underwear was removed, not to "humiliate" him, but only for the purpose of obtaining scientific evidence which might have exonerated him. In fact, this was the very result of the tests that were conducted. Not one of the laboratory findings could be characterized as anything but beneficial to the petitioner.

Each of the laboratory tests was performed with the full consent of the petitioner (398, 413, 468). His initial hesitancy was overcome, not by any deception or coercion as the petitioner now suggests to this Court (pp. 4-5, petitioner's brief), but by a graphic demonstration that the saline solution was harmless and by his being informed that the tests might help to establish his innocence (511, 514). Not only was the petitioner fully advised that he need not consent to the tests (413, 510), he was even invited to select

a doctor of his own choice to conduct the tests (467, 517). That his consent to these tests was willingly given (398, 413, 468) is not now denied by the petitioner.

The petitioner argues that the rationale of the *Malinski* case applies to him because he disrobed in connection with the washing of his penis and because the police retained his underwear to search for staining. What was properly condemned in the *Malinski* decision was the removal of the prisoner's clothing to exert psychological pressure during interrogation. No such facts ever occurred in this case. The petitioner was given other clothing and was not continued in any state of undress. The examinations were conducted solely to obtain impartial and objective evidence which could benefit an innocent man as well as incriminate a guilty one (515-516). As the petitioner continued, for over nine hours, to deny his guilt it is entirely unreasonable to believe that these tests were designed, or operated, to coerce him into confession.

C.

That petitioner was deprived of food and drink.

The petitioner now complains that he had no food and drink (pp. 3, 9, 12, petitioner's brief) during the period of his detention by the police but only once does he acknowledge that he was offered food (p. 12).

The record reveals the full facts. Five separate police officers offered to feed the petitioner on six distinct occasions, i.e., at 6:30 P. M., 8:00 P. M., 10:30 P. M., 1:30 A. M., 3:00 A. M., and 5:30 A. M. (260-263, 302, 335, 561, 564, 567, 570, 1435). It is undisputed that, on each of these occasions, the petitioner declined all offers of food, sandwiches or coffee. He even failed to accept cigarettes (1407, 1436).

D.

That questioning of petitioner continued long "after the police were seemingly satisfied that he was the guilty party * * * and had proof sufficient to arraign and indict."

From the time that Detective Rofheart visited the petitioner at his home until Sunday Graham's body was discovered about 4:00 P. M., the police were not conducting a murder investigation. They were trying to locate a missing child. There was no reason to believe that the petitioner was guilty of any crime—let alone that he was responsible for the death of Sunday Graham. The questioning of the petitioner up to this point, which was carried on solely by one man, Detective Rofheart, could only be characterized as intermittent and desultory.

Even then, Detective Stark and other members of the homicide squad did not begin to question the petitioner until after 9:00 P. M. that evening (264). The laboratory tests, during which the police did talk to the petitioner in general terms about the crime, were not concluded until about 8:00 P. M. (585). Rofheart did not question the petitioner while Stark was at dinner (263). Thus, the petitioner was questioned with respect to the then murder investigation for a period of approximately eight and one half hours prior to the first confession.

The petitioner recognizes the weakness of his position in contending that the circumstances and length of his detention prior to his confessions rendered them inadmissible in violation of due process. He thus seeks to enlarge the total time consumed by the "inquisition" (p. 9, petitioner's brief) by complaining of events after his arraignment, more than three hours after the confessions were concluded. Therefore, he extends the period of the "inquisition" to include his visit to the police laboratory (to identify some clothing—474), his visits to the scenes of the

crime (which he agreed to show the police—574) and his examination by Doctor D'Angelo, a psychiatrist (solely to ascertain petitioner's mental condition and not to obtain any further confession—1015).

The very factors emphasized by the petitioner in seeking to convince this court that his confession was tainted with some irregularity or involuntariness indicate that his claim is specious. Thus follow the bland assertions that "the police were satisfied that they had 'their man', * * * and believed that a confession was forthcoming provided they persevered in their 'softening-up' process" (p. 13, petitioner's brief). Neither these extravagant statements nor the quoted phrases find any support in the record.

The petitioner also questions why he was first brought to the Third Precinct in Williston Park rather than to Police Headquarters in Mineola, which was a mile nearer his home (pp. 9, 14, petitioner's brief). The simple answer is found in the record. The detectives assigned to search for the missing child were attached to the Third Precinct which included, as part of its territory, the Village of Hempstead where Sunday Graham was reported lost (174, 231, 272).

Petitioner devotes much of his brief (pp. 13-15) to an extended argument that the interrogation by the police continued after they had "proof" sufficient to indict him.

It is the law of New York that, to sustain an indictment, the legal evidence presented to the Grand Jury must, if unexplained or uncontradicted, be such as to warrant a conviction by the trial jury, Code of Criminal Procedures, Section 251, *People* v. *Lieberman,* 3 N. Y. 2d 649.

Yet, the petitioner argues that his past record (which could not be introduced in evidence against him), his relationship with Sunday's step-mother, the vague description of the automobile and its driver given by Sunday's classmate, taken together with the peanut shells found on the floor of the petitioner's automobile (which could not be

connected in any way with the peanut shells found in the victim's hair—520) would be sufficient evidence to sustain an indictment for murder.

As petitioner's trial counsel correctly argued, at the close of the prosecution's case (643-656), all the evidence introduced upon the trial—with the exception of the confessions—would not,—if taken together, justify sending the case to the jury. Petitioner's trial counsel demonstrated that the items of evidence, other than the confessions, connecting the petitioner with the crime were so tenuous and vague that they constituted a complete lack of proof of the petitioner's guilt. But the petitioner now urges that nothing more than suspicion in the minds of the police officers was sufficient to arraign him upon formal charges of murder and more than ample "proof" to obtain an indictment.

The petitioner was arraigned at the first available opportunity after the police had evidence—and not mere suspicion—upon which a charge could be founded. Both Detectives Rofheart (279, 343-344) and Stark (598) knew from past experience that the Nassau County District Court in Mineola closed each day between 4:00 and 4:45 P. M. Therefore, no magistrate was available to arraign the petitioner after this hour (347, 351). Rule I of the Nassau County District Court Rules provides:

> "Court hours. The hours of the court shall be from 10 A. M. to 5 P. M. The office of the Clerk shall be open for business from 9 A. M. to 4 P. M. each week day and from 9 A. M. to 12 o'clock noon on Saturday. * * * "

Sunday Graham's body was not identified until about 5:00 P. M. (332-333). At that time no court was open to conduct an arraignment (347) even if there was evidence sufficient to justify filing of any charges against the petitioner (351). No such evidence existed.

Truly, petitioner's association with the victim and her step-mother, and the similarity of his attire to that of the driver of the car, dictated that the police investigate his activities on the day of the crime. However, no basis, either in fact or law, existed for the police to maintain any formal charges of rape or murder against the petitioner prior to his giving a truthful statement.

The very items relied on by the petitioner in asserting that the police had sufficient proof to arraign and indict him are mutually inconsistent. On the one hand, petitioner points out that the description given by Sunday's classmate and the peanut shells found in his car pointed inexorably toward his guilt. On the other hand, the petitioner complains that "the police persisted in their questioning notwithstanding Phillips' steadfast denial of guilt and seemingly plausible alibi" (p. 14, petitioner's brief).

The enigma that confronted the police officers was the same. Although certain items seemed to indicate petitioner's complicity in the crime, "his steadfast denial of guilt and seemingly plausible alibi" effectively prevented them from making any but the most tentative of judgments. This enigma was the very explanation for the detectives being sent out to verify the petitioner's statements and also for the tests conducted by Inpector Pribyl and Dr. Lukash (592). These very efforts of the police tended to absolve the petitioner and showed that investigation of an unsolved crime was still in progress. Nothing was conclusive at the time the tests were made. Before their results could be known, petitioner himself, borne down by the enormity of his deed and stirred by his own conscience, gave his truthful and entirely voluntary confessions.

E.

That petitioner "was deceptively informed that Sunday's blood had been found on his clothing."

Petitioner claims that the Assistant District Attorney wove a deliberately deceptive web in which to entrap him when he informed the petitioner that Sunday's blood had been found on his underclothing. Although laboratory analysis on the following day could not establish that this blood was Sunday's, or even that it was human (473-475), the prosecutor's assumption—prior to laboratory analysis—was an entirely reasonable one. The child had bled to some extent (459, 485) as a result of the tearing and laceration of her vagina (391-392) and blood stains had been found on the petitioner's underclothing (473-475). Although the Assistant District Attorney did not have the benefit of the full laboratory report at the time of his questioning, it is difficult to believe that his guess as to origin of the blood operated to deliberately mislead the petitioner.

Even if it be assumed, as petitioner does, that the prosecutor was aware that his statement was false, the use of such a trick does not, of itself, exclude the confession induced thereby, III Wigmore on Evidence (3d Ed.) Section 841. As observed in *Lewis* v. *U. S.*, 74 F. 2d 173, 177 (9th Cir.):

> "False statements as to the amount of incriminating evidence against the defendant might tend to make a guilty man confess, but would not have that tendency if the man were not guilty unless the statement as to the evidence was coupled with some promise or representation in regard to the advantage to be gained by a confession, or plea of guilty."

F.

That petitioner's confession was not transcribed until after he "agreed to confess."

In striving to fit the circumstances of his detention within the ambit of this Court's decisions, the petitioner's brief contains assertions which are not in accord with the facts in the record. It is claimed, for example, that "The stenographer was not actually summoned to police headquarters until shortly before Phillips agreed to confess" (p. 14, petitioner's brief). The testimony of the court reporter—completely substantiated by the text of petitioner's verbatim statement (1384-1430)—was direct, clear and unchallenged (541-542). The petitioner had not "agreed to confess" when the Assistant District Attorney began to question him. He had given no advance indication at all that he would confess or even make any damaging admission. This fact was confirmed by the petitioner in his direct testimony: he was questioned for "almost an hour" by Mr. Cahn before he "broke down and confessed" (738-739).

This Court, in *Spano* v. *New York*, 360 U. S. 315, forbade the use of the confession obtained under circumstances where the prisoner, who had been previously indicted, persisted in his refusal to answer any questions and repeatedly sought the advice of the attorney who had surrendered him to the police. The petitioner, to the contrary, not only never refused to answer any questions, nor did he seek the aid of counsel at any time. He consistently answered all inquiries. The petitioner had considerable previous experience with the criminal law. He knew well eleven years earlier that he was under no obligation to offer any statement or explanation upon questioning by the police. In the previous rape charge, not only had he never confessed, he took the stand and denied his guilt.

Even though the petitioner's answers constituted nothing less than a web of lies, carefully and cleverly designed to conceal his responsibility for the crime, he still did not refuse to answer or make any statement. In fact, he was almost garrulous in accounting for his innocence. He gave a misleading account which sent detectives out in the field to investigate his claimed movements on the day of the murder. In this way the police sought to determine the truth and accuracy of the statements given by the petitioner. At no time did the petitioner decline to answer. His declination was to tell the truth.

G.

That statements in petitioner's "confession indicate that he was overborne by long questioning and had succumbed to and adopted the suggestions of his inquisitors."

A reading of the answers given by the petitioner, at the outset of his questioning by the prosecuting attorney, reveals that he encountered no difficulty in giving specifics as to his biography, his relations with the victim and her mother, his wardrobe or as to his automobile license number. He precisely related his activities on the day of Sunday's disappearance. It was not until the petitioner began to recount the true facts of his abduction, raping and slaying of the infant that he began to equivocate as to certain of the details.

The first part of the petitioner's actual confession demonstrates that the Assistant District Attorney suggested a minimum of the answers (1438-1440). The petitioner was able to trace his extended and complicated automobile tour with the victim and remembered well the time interval involved (1446, 1459). He even named the streets that he drove along (1440, 1448-1450). It was only when the prosecutor attempted to ascertain at what point the petitioner first decided to have intercourse with Sunday Graham (1450), or why he wrapped the belt around her neck (1461), that his memory became "hazy".

Examination of the inculpatory portion of the petitioner's statement (1437-1461) compels the irresistible conclusion that the petitioner was in full possession of all his mental faculties while he recounted his travels and his actions on the afternoon of the crime. Petitioner, however, to support his argument that he "adopted the suggestions" made to him (p. 10, petitioner's brief), seizes upon several of his answers where he "guessed" (1440), "assumed" (1459) or "believed" (1455) what he had done, or as to what "must have" happened (1450), as indicating that his mind was "unclear".

In fact, many of his answers were quite articulate and evidence that the petitioner fully grasped the significance of his conduct the day before and the import of his confession:

> "Q. Well, how long after you picked her up at the school did this happen? A. I don't know. Twenty minutes or a half hour or so.
>
> Q. About twenty minutes to a half hour after you picked her up from the school? A. Yes.
>
> Q. All right, now, after you finished inside of her what did you do? A. Took her belt and put it around her to stop her from fighting and going on." (1444)
>
> * * *
>
> "Q. Where did you drive? A. I just drove around. I remember coming off Babylon Turnpike. I remember coming on through Hempstead. Just headed towards Mineola.
>
> Q. All right, and then what happened? A. And I rode out by Mitchel Field, through that area to Uniondale Avenue, and come back around Mitchel Field and went down where those warehouses are over there, and that's where I left her.
>
> Q. About what time did you leave her in back around Mitchel Field? A. About 5 o'clock.
>
> Q. About 5 o'clock in the afternoon? A. About. That is judging from the time I noticed when I got over to Mineola." (1445-1446)
>
> * * *

"Q. And when you picked her up in the car what did you intend to do, when you picked her up in the car? A. I didn't recognize her—I didn't see her at first. Then I just recognized her and she ran up to my car and I stopped and I said Hi, and she said Hi, and I said, 'Come on, are you going home?' She said yes. Then she said, 'Well, daddy is home. Don't take me home.' I said, 'O.K.. I'll take you near home.' And then we started riding." (1449)

H.

That petitioner's confessions were procured by "the marathon interrogation * * * conducted by changing personnel."

The petitioner, his crimes, and the circumstances of his confessions, all stand clearly forth in the record. In sum, the petitioner, a criminal with long experience in denying guilt, and with better than average education and above normal intelligence, confessed—not from coercion or pressure—but freely and voluntarily.

As pointed out (p. 15, *supra*) the questioning of the petitioner, as a suspect in connection with the investigation of Sunday's murder, did not actively commence until about 9:00 P. M. While it is true that he was questioned by several police officers [by Captain Closs (264), by Detective Stark and Lieutenant Cummings (564-565) and finally by Chief of Detectives Pinnell in police headquarters (567-568)] before he was interviewed by the prosecuting attorney, the questioning was not at all continuous. Chief Pinnell's questioning, for example, ended about 4:30 A. M. (568). The petitioner was not again questioned until he began to give his statement to the Assistant District Attorney at 5:10 A. M. (568, 1384). Moreover, there were additional intervals during which he was not questioned, e.g., the visits by Mrs. Graham (266) and by Curtis Maddox

(267). Thus, the total period during which questioning was conducted, prior to the first confession, was approximately eight and one-half hours.

But the petitioner compares his detention to the situations presented in *U. S. ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Cir.), cert. denied 350 U. S. 896, and *U. S. ex rel. Wade* v. *Jackson,* 256 F. 2d 7 (2d Cir.), cert. denied 357 U. S. 908.

In the *Caminito* case the delay in arraignment was forty hours, yet the Court pointed out, pages 700-701:

> "* * * the unlawful detention for many hours * * * would [not] suffice to vitiate the confessions as unconstitutionally obtained."

In the *Wade* case the Court concluded, page 11:

> "* * * the undisputed facts and the inadequate explanations made by the State are sufficient to show that by violence and harassment Wade's statements were finally extracted from him against his will because he could resist no longer and he knew there was no other way to bring an end to his ill treatment."

In short, the Court of Appeals found as a fact that Wade had been beaten in the manner that he had testified. Here, however, the petitioner took the stand not, as Wade did, to testify that he had been brutally struck, but to offer a defense based on "mental disorder".

Even this defense was not without question. The testimony of Dr. D'Angelo, called in rebuttal by the prosecution, brought out the fact that petitioner was able to coherently relate the details of his crimes during his examination by the psychiatrist (1007). Dr. D'Angelo concluded that the petitioner was not even suffering from any nervous condition—let alone any mental illness—and was in contact with reality at all times (1005).

The same factual situation presented here was faced, upon the trial, by the experienced attorneys who repre-

sented the petitioner. They were confronted with a client who had shaken hands with each of his "torturers" just before he confessed. As neither violence, nor false promises, nor duress were used in any manner to coerce his confessions, no reasonable claim could have been advanced in this direction. The other assertions which the petitioner now makes to this Court, in his effort to be released from responsibility for his crimes, are no less unreasonable. Rejection of them is amply justified by the evidence in the record.

CONCLUSION

The order and judgment of the New York Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 497

WILLARD H. PHILLIPS,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief demonstrates a calculated determination to ignore the obvious and to substitute, instead, bold assertions based on trivia alone. By artful manipulation of the witnesses' testimony, it seeks to implant in the mind the seed by which the confession may be found voluntary in spite of those proofs which demonstrate, inexorably, the compulsion by which that confession was ultimately extracted. We treat *seriatim* the assertions of respondent which warrant comment, under the following subheadings which correspond to those in respondent's brief.

A.

Conceding, in effect, that petitioner's testimony that he was "beaten around and forced to do different things" (805) was not adequately refuted because of the "failure to call all the police officers who questioned the petitioner" (Resp. Br. p. 13), respondent seeks to offset the natural consequence by claiming that it was petitioner's burden to call those witnesses and by a belittling allusion to the remarks by petitioner's trial counsel respecting the number of witnesses by whom he hoped to demonstrate the coercive measures used. Those witnesses—police officers—were all within the control of respondent, and even respondents' authorities (Br. pp. 12-13) support the claim that the prosecutor's failure to call them is significant. In a case such as this, can one realistically conceive of police officers being called, as defense witnesses, to testify to the use of coercion by themselves or by any of their brother officers?

In any event, the claim of violence is but one facet of this case. This Court takes account of the "totality of the circumstances" and the use of "more sophisticated modes of 'persuasion.'" (*Fikes* v. *Alabama*, 352 U. S. 191, 197; *Payne* v. *Arkansas*, 356 U. S. 560, 567; *Blackburn* v. *Alabama*, —— U. S. ——, 80 S. Ct. 274, 279.)

B.

Then too, respondent, at pages 14 and 15, seeks to refute petitioner's claim that he was "stripped • • • and subjected to a humiliating examination of his private parts" by asserting that "he was immediately furnished fresh clothing" and that the "result" of the examination was "beneficial." The record does show that somewhere along the line petitioner was—after being stripped—furnished other clothing (261); of immediate replacement there was no testimony whatever. Furthermore, the stripping and

"washing" are fully conceded and common sense dictates that new clothing could not have been donned until after the police experiment had been completed. This was but another step in the "softening" process—while the prosecutor in *Malinski* conceded that the removal of clothing was to humiliate the prisoner, here we have the police admitting their purpose "to get a confession" (342), their design to force and extort a confession—to "exact" one (346). Moreover, this incident, by its very nature, was a humiliating one regardless of the motives of the police and the duration of petitioner's nudity.

C.

Likewise, respondent, in its brief (p. 15) makes much of the fact that petitioner was offered food, coffee and cigarettes though it is conceded that he had none. Surely, his abnormally long abstention from food and drink, even if offered, is strongly indicative of his overborne mental state. A still more important factor—completely ignored by respondent—is that he had no rest, no sleep, for a period of 23 hours or more immediately preceding his confession (296, 616).

D.

Respondent has gone to great lengths in an attempt to compress the period of interrogation to a mere eight and one-half hours (Resp. Br. pp. 16-19, 24-25) and offers a "whitewashing" for its failure to effect a seasonable arraignment. The record, however, demonstrates the contrary.

Whether Phillips was interrogated concerning a disappearance or a homicide—the fact remains that for more than 18 hours he was subjected to almost continuous inquisition, finally succumbing at 5:00 a.m., when he gave "answers that would expedite" the inquisition—it was his

only surcease (805-807, Pet. Main Br. pp. 4-6, 9). In fact, it was hours earlier that Rofheart—who had not been subjected to that interrogation and prodding—had retired, a "very tired" man (334).

Considerable argument is offered for the delay in arraignment—the principal claim being that the police did not realize that a homicide had occurred until 5:00 P.M. on May 13 and that their inquisition did not, therefore, actually commence until that hour. That, of course, disregards the cumulative effect of the total detention and interrogation and is the equivalent of saying that they began their coercive measures too soon—that they should be excused for all that transpired before they had the proof of that which they had suspected all the time—the felonious disposition of Sunday Graham by petitioner.

Had respondent's officers so desired, they could properly have arrested petitioner at least upon the discovery of Sunday's body at 4:00 p.m., May 13. Then it was known that a felonious homicide had been committed; then they had actual and reasonable cause to believe that petitioner had effected that homicide. Here is what they knew—not suspected—at 4:00 p.m., May 13, when, as respondent concedes, a magistrate was still available for arraignment purposes and was required, by court rule, to be available for another hour (Resp. Br. p. 18):

1. Sunday Graham had been missing since 2:50 P.M. on May 12, 1958 and was reported as missing on the same day (171-174; 178-179).

2. A description of Sunday and her clothing, including her distinctive school uniform, was furnished to detectives on May 12 (95, 232-234).

3. On the morning of May 13, the detectives were advised that Sunday had, on the prior afternoon, en-

tered and been driven off in the automobile of a male negro, and of the circumstances surrounding that episode (186-187, 191-192, 233-234).

4. Phillips' automobile, and clothing taken by detectives from his room on the morning of May 13, tallied with the description of the car in which Sunday had been driven away and with the description of the clothing worn by the operator of that car (187-191, 237-238, 245; Exhs. 11, 12, 13).

5. At 3:00 P.M. May 13, petitioner admitted being in the neighborhood with his car where, and at about the time that, Sunday had been observed entering the automobile (1341; Exh. 14).

6. Knowledge of the homicide was furnished to the detective in charge of the investigation at 4:00 P.M., May 13 (258).

7. The dead body found was that of a young negro girl, dressed in the school uniform and clothing identical to that worn by the missing Sunday Graham (Exhs. 15, 16).

8. Peanut shells were present in the victim's hair and also in petitioner's car which had been observed by detectives as early as noon, May 13 (245, 386-387, 496-497).

9. Blood was found on and beneath the body (392, 458). In addition, stains, apparently blood, were present on underclothing taken from petitioner's room which, so far as the record shows, was searched but once—at about noon May 13 (237-238, 471-477, 1430).

All this information, possessed by the police at 4:00 P.M., May 13, was more than sufficient, particularly in the light of the threat voiced to Sunday's mother (114-116) to per-

mit an arrest, and to support a determination by the magistrate to hold petitioner to answer a charge of felonious homicide. *New York Code of Criminal Procedure,* Secs. 207, 208; *People* v. *Bieber* (not officially reported), 100 N.Y.S. 2d 821; *People* v. *Ehrlich* (not officially reported), 14 N.Y.S. 2d 125; *People* v. *Pearsall* (not officially reported), 59 N.Y.S. 2d 616.

In fact, that proof, uncontradicted and unexplained, was sufficient to support an indictment. *New York Code of Criminal Procedure,* Sec. 251; *People* v. *Lieberman,* 3 N.Y. 2d 649.

The continued interrogation, despite the evidence then at hand, demonstrates the true purpose and desire of respondent's agents—not to solve a crime, but rather to extract a confession to guarantee a conviction therefor. This violation of the rule of the *Spano* case appears also from admissions of Rofheart and the prosecutor himself. "Before" petitioner confessed, the prosecutor "knew" he was "sunk" (1437). Many hours prior to the confession, Rofheart had reason to suspect the petitioner (341), and knew he had "proof to arraign" and "to arrest" him, and had "sufficient proof for a case" (348-350) but nevertheless kept him in custody to "exact" a confession (343).* As in *Malinski* v. *New York,* 324 U.S. 401, 407, the prosecutor and Rofheart should be taken at their word.

Even if petitioner had been promptly arraigned on the homicide charge, the tactics employed by the police in all likelihood would have continued unchanged in order to wring from petitioner the confession they so much desired. Long after the first confession, and more than 24 sleepless

* Certain of these admissions were subsequently qualified to some extent but only after the prosecutor had hammered away at the witness in a manner which made it abundantly clear that that qualification was desired (347-350).

hours after petitioner's apprehension, respondent's agents were still bent upon securing a full, detailed confession covering every particular of the crime which, they were satisfied, had been committed by petitioner (Pet. Main Br. pp. 6, 9). Respondent would have the Court ignore the events subsequent to petitioner's 5 a.m. confession (Resp. Br. pp. 16-17), but *Haley* v. *Ohio,* 332 U.S. 596, 600, holds to the contrary.

E.

If, as respondent claims, the prosecutor did not know the nature of the spots on petitioner's underclothing, but could only have made an assumption in that regard (Resp. Br. p. 20), one cannot escape the conclusion that the prosecutor deliberately made his assertion to petitioner that it was Sunday's blood, with the sole purpose of trapping him when his tortured mind had become weakened to the point where it could no longer resist the onslaught of questions. There was the vice.

F.

Petitioner's resistance to the continued interrogation by the prosecutor for "almost an hour" after having been subjected to the police inquisition for approximately 19 hours simply establishes that he had been successfully worn down by their pressures. This result must have been anticipated by respondent's agents when, at 11:00 P.M. on May 13, they alerted the stenographer who ultimately recorded the confession, when they transported petitioner to headquarters in the wee hours of the morning, and when they finally summoned the stenographer at 4:15 A.M., May 14. They had merely erred respecting the hour at which he would become as putty in their hands.

G.

Respondent argues that petitioner was quite articulate in confessing, but concedes that some answers were suggested by the prosecutor (Resp. Br. pp. 22-23). This suggests that more forceful and blunter hints had been insinuated by the police—uninhibited by the presence of a stenographer—into petitioner's mind during the previous 19 hour ordeal. Clearly, he must have succumbed to the "brainwash," and was merely parroting the ideas they had thus instilled.

H.

The contention that only 8½ hours were spent in questioning petitioner ignores—but does not deny—the continued interrogation which began at 11:00 A.M.; and it cleverly overlooks the experiment conducted by Dr. Lukash, and the activities of Inspector Pribyl by which petitioner was induced to submit to their examination. In a similar attempt to shrink the period of detention, respondent says that the police would not have restrained petitioner "if he had wished to leave" prior to 5 P.M. (Resp. Br. p. 6). Can anyone imagine what would have happened had this petitioner attempted to leave under the circumstances of this case?

The hand shaking incident is stressed (Resp. Br. pp. 9, 26) but is of no more significance than Haley's statement that his confession was voluntary (*Haley* v. *Ohio*, 332 U.S. 596, 598). Note, that just after this incident, the prosecutor here subtly suggested or promised leniency, stating that petitioner might not be "sunk" if he related exactly what happened (1437). Counter to the prosecutor's claim, we could as well assume that petitioner shook hands to signify his acceptance of similar prior promises by the

police, to signify his defeat, or simply in the hope of avoiding further coercive treatment.

Respondent also suggests that petitioner's experienced trial counsel would have adduced more concrete proof of coercion if such were the case—that he made the best of a hopeless situation (Resp. Br. pp. 13, 25-26). Due allowance must be made for the manner in which the issues here raised were presented in the lower court—the defense was unorthodox. It was a "game of tag or hopscotch" according to the prosecutor's summation (1120). Although the Trial Judge felt obliged to instruct the jury on the law of insanity (1258), and although psychiatric and other testimony was sufficient to raise that issue (778, 794, 836, 863-864, 875, 877, 883, 905, 954-955, 958), defense counsel expressly waived that defense (40, 818-819) and submitted no argument or requests to charge with respect thereto. In addition, counsel deliberately elicited, or attempted to elicit, from the prosecution's first witness testimony that petitioner had carnally assaulted young white girls and had engaged in an adulterous relationship with Sunday's mother (142-145, 147-149, 710-711).

CONCLUSION

Here, as we have shown, petitioner was detained wholly incommunicado, and subjected to interminable interrogation and coercive treatment during the day and into the dead of night, and beyond the time when he not only could, but should have, been arraigned, and was deprived of sleep and rest, and was without food or drink. These circumstances, we say, on the established, conceded facts constituted a denial of due process.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 497.—October Term, 1959.

Willard H. Phillips, Petitioner, v. New York.	On Writ of Certiorari to the Court of Appeals of New York.

[April 25, 1960.]

Per Curiam.

After hearing oral argument and fully examining the record which was only partially set forth in the petition for certiorari, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed as improvidently granted.